# Tetuan Khana & Co (sued as a firm) v Saling bin Lau Bee Chiang and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS J-02(W)-219–02 OF 2017, J-02(W)-220–02 OF 2017, J-02(W)-221–02 OF 2017, J-02(W)-224–02 OF 2017, J-02(W)-225–02 OF 2017, J-02(W)-226–02 OF 2017, J-02(W)-227–02 OF 2017 AND J-02(W)-228–02 OF 2017

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*Trusts and Trustees — Trust property — Fraudulent dealings with — Whether plaintiff proven that trustees and persons who intermeddled with trust property caused loss and damage to trust and had to make reparations — Whether injury caused to trust by acts or omissions of several defendants indivisible — Whether defendants jointly and severally liable to compensate trust for whole of damage suffered by it whether they acted as joint tortfeasors or not*

The decision herein only concerned the appeals by Virgin Properties Sdn Bhd ('D1'), Ku Azhar bin Ku Abdul Razak ('D2'), Dinesh Kanavaji a/l Kanawagi ('D3'), Messrs Khana & Co ('D5') and the husband-and-wife partners — namely, Riza Makhzan Arifin ('D6') and Puteri Intan Nurul Arzian bt Abdul Aziz ('D7') — of the legal firm of Messrs Sharifah & Associates, against a decision of the High Court favouring Linggiu Valley Orang Asli (Jakuns) trust ('the trust') which acted through its receiver and manager ('the plaintiff'). Another two appeals that were filed by Kanawagi a/l Seperumaniam ('D4') — who was one of the first trustees of the trust and also D3's father and co-partner in D5 and co-director in D1 — were struck off because of his failure, as a bankrupt, to obtain the sanction of the Director-General of Insolvency to prosecute the two appeals. The genesis of the instant litigation began when three *orang asli* (Jakun) villages occupying Linggiu Valley in Johor lost their ancestral lands, on which they depended for their sustenance and livelihood, when the Johor state government acquired a huge part of the valley to construct a dam. A group of the affected *orang asli* ('the applicants') on their own behalf and on behalf of the other villagers engaged D4 to sue the authorities for compensation. The High Court awarded RM26.5m as compensation. Five years later, when the amount had swelled to RM38,554,111.92 (inclusive of interest), the High Court ordered RM22m ('the trust fund') of that sum to be paid into an account of the trust managed by five trustees (including D4) and the balance RM16,554,111.92 to be paid to D5 for distribution to the applicants after various deductions for legal fees, costs, consultation fees and expenses had been made. Several of the beneficiaries of the trust later successfully applied to court to appoint the plaintiff as the receiver and

manager of the trust in place of the original trustees ('the former trustees'). Two years after his appointment, the plaintiff on the trust's behalf, sued D1–D7 ('the defendants') in the High Court for various fraudulent dealings with the trust's property. Besides fraud, the plaintiff's claim was premised upon negligence, unjust enrichment, conspiracy to injure by unlawful means and breaches of fiduciary duties, duties of care and legal and professional duties. The plaintiff pleaded that pursuant to purported resolutions passed by the former trustees, D4 used RM7m of the trust fund to buy 27 condominiums ('the 27 units') in his own name after instructing Messrs Sharifah & Associates, acting as solicitors for the trust in the purchase transaction, to remit that sum to D1. D1 was incorporated with a RM2 paid-up capital with D3 and D4 as its original directors before D2 became a director when D4 later resigned. D1 had signed a management agreement with D4 allowing D1 to lease the 27 units for 20 years and, in turn, rent out the said properties to third parties at any rent it deemed fit. When it received the RM7m from Messrs Sharifah & Associates, D1 used that sum to increase its paid-up share capital by that amount by issuing seven million more shares between its two directors (D2 had become a director in place of D4 at the time). D1 also used the RM7m to pay RM628,080 to D4 (purportedly to reimburse him for a deposit he had paid to buy the 27 units) and spent RM619,200 purportedly to carry out renovation works on the 27 units. The plaintiff alleged that D3 had also used the trust fund to buy another 30 units of condominiums ('the additional 30 units') for himself since the deposit monies for those purchases were paid by D1 from the income it earned from the rental of the 27 units. The plaintiff averred that the management agreement was created to defraud the trust and enrich D1, D3 and D4. In reparation for the losses and damages the trust had suffered, the plaintiff sued the defendants for, inter alia, damages, restitution of monies and properties belonging to the trust, and declarations that the trust owned the 27 units and the additional 30 units and that the management agreement was null and void. Apart from dismissing a claim for exemplary damages against the defendants, the High Court allowed all other reliefs sought by the plaintiff and also ordered D1–D7 to pay the plaintiff RM10,432,334 in general damages. This figure comprised the return of the aforesaid sums of RM628,080 and RM619,200, rentals that were earned by D1 on the 27 units and other secret profits that it had made using the trust fund. In response to the instant appeals by the defendants against the High Court's decision, the plaintiff filed a cross-appeal against the dismissal of its claim for exemplary damages. While the appeals were pending hearing, Malayan Banking Bhd ('MBB') intervened to add itself as a party to the appeals and argued that it should be declared as the owner of 16 of the additional 30 units because it had financed D3's purchase of them in return for an absolute assignment (not by way of charge) of the 16 units in its favour.

In their defence, the defendants pleaded, inter alia, that: (a) D4's purchase of the 27 units and the release by Messrs Sharifah & Associates of the RM7m to D1 were authorised by resolutions passed by the former trustees; (b) the 27

A units were not for D4's personal benefit but for the benefit of the trust; (c) no monies belonging to the trust were used to buy the additional 30 units; (d) no loss was caused to the trust since the 27 units earned rental income for the trust; (e) D1 had actually used the RM619,200 to renovate the 27 units; (f) no monies belonging to the trust were used to inflate D1's share capital; (g) the B management agreement was valid because, pursuant to it, all rentals D1 received from the 27 units were paid to the account of the trust; and (h) the trust, being a non-legal entity, had no capacity to sue the defendants.

C **Held**, unanimously dismissing the appeals, the cross-appeal as well as MBB's claim to ownership of 16 of the additional 30 units and affirming the decision of the High Court:

(1) There was no reason to interfere with the finding of facts made by the trial judge as he had given full and sufficient judicial appreciation to the entire D evidence, the facts and the case for the defence before coming to his decision. There was no blind wholesale adoption by the trial judge of the plaintiff's submissions and it was pure conjecture on the part of the defendants to suggest that the judge had not considered the submissions for the defence. The trial judge had considered the receiver and manager's E 12 reports (which were unrebutted), the conduct of the defendants and the demeanour and credibility of the witnesses. He found the defence witnesses to be lacking in credibility and consequently did not attach any weight to their evidence. In particular, he found that D3, D4, D6 and D7 were evasive, inconsistent and untruthful. There was nothing in the F memorandums of appeal to suggest or convince the court that the trial judge had erred or misdirected himself in any way or that there were any meritorious issues which warranted a reversal of the High Court's decision (see paras 53, 197–198 & 201).

(2) The plaintiff's cross-appeal was fatally flawed and had to be dismissed as G it was clearly unconnected to the substance of the defendants' appeals. There was clear authority to show that the plaintiff ought to have filed a separate notice of appeal regarding the dismissal of its claim for exemplary damages. If a party wished to attack a substantive finding of the court below, it had to file a proper notice of appeal and could not raise H by way of cross-appeal a point which did not affect the original appellant. Even on the merits, the cross-appeal failed. The losses suffered by the trust were sufficiently compensated by the order of the High Court by way of general damages and other redresses. The 27 units and the additional 30 units were declared to be the assets of the trust and were I ordered to be returned to it with no loss but instead with their value undoubtedly enhanced. All the monies spent out of the RM7m as well as all the secret profits earned consequent upon the withdrawal of the RM7m from the trust fund were ordered to be returned to the trust as general damages totalling RM10,430,334. Following the High Court's

order, the trust was amply and fully restituted and adequately compensated. Thus, any award by way of exemplary damages, which was aimed at punishing a defendant for his wrongdoing, was unjustified in the circumstances (see paras 205–206).

(3) The trial judge rightly found that MBB's deeds of assignment dated 4 March 2011 could not be valid in the light of the fact that D3 had only secured his rights to the 16 condominium units in 2015. Apart from that fact, the assignment to MBB merely gave it an equitable charge with the right to foreclose on default and did not make it the 'owner' or 'proprietor' of the 16 units. The declaratory type of relief sought by MBB that it was the 'owner' of the 16 units was misplaced (see paras 183 & 191–192).

(4) MBB had not shown where the trial judge had gone wrong or how his judgment was illegal or made without jurisdiction and hence a nullity. As such, the trial judge's decision could not be set aside. MBB had no cause of action against the plaintiff and merely sought to impeach the judgment on the ground that it was a nullity simply because it was not made a party to the suit. In reality, MBB only had a claim against D3 as its borrower and 'assignor' whereas the judgment was between the trust and D3. MBB's rights against D3 were unaffected and, if affected, they should be ventilated in separate proceedings between them. If MBB wished to claim the 16 units, it should file a fresh claim against D3 as its borrower and 'assignor' (see paras 188, 190 & 193).

(5) On the evidence, the trial judge correctly found D1–D7 liable to account to the trust for all monies earned on behalf of the trust and any asset acquired using money taken from the trust fund. D4 was liable as the trustee at all material times while the rest of the defendants became constructive trustees by virtue of their dealings with the trust properties. The injury or loss suffered by the trust was clearly the same and indivisible. Accordingly, whether all the defendants were joint tortfeasors or not, each of them was liable for the same damage and had to compensate for the whole of it (see paras 3, 167 & 169).

(6) From the time (July 2000) the Johor State Government paid the trust fund of RM22m directly to D5 as solicitors acting for the *orang asli* applicants until the time the said sum was deposited with Amanah Raya Bhd in 2005, no account was submitted by D4 as the trustee to the trust as to what had happened to the RM22m and the interest earned thereon. The deed of trust required the trustees to maintain proper accounts and their failure to do so constituted a breach of the trust deed (see paras 54–55).

(7) While the defendants conceded that the 27 units belonged to the trust, the facts showed that D4's conduct was directly opposite to and

inconsistent with that concession and clearly evinced an intention to buy the 27 units for himself. There was no evidence to show that the tender deposit of RM628,080 paid for the purchase of the 27 units came from D4's own money as the documentary evidence showed that his personal bank account had received interest generated from the trust's RM22m. The plaintiff had therefore proven its claim for the return of the RM628,080 as part of general damages payable to the trust (see paras 63 & 69).

(8) D1's records did not support, and in fact contradicted, the assertion that it had used RM619,200 out of the RM7m from the trust fund to renovate the 27 units. D3 and D4, as the directors of D1, could not explain the documentary evidence they had tendered in an attempt to show that the said amount was actually expended for the renovation of the 27 units. In the circumstances, the trial judge found that their testimonies were not credible and rejected their evidence and correctly held that the RM619,200 had to be returned to the plaintiff as part of general damages (see paras 75–76 & 78).

(9) The management agreement as a whole was not a fair commercial dealing as it involved unfair terms and contained the elements of fraud, self-dealing and unjust enrichment. The terms of the management agreement were detrimental to the trust whose interests D1–D4 were expected to protect as trustees/constructive trustees/fiduciaries. As the management agreement was declared to be void as from the date of the High Court's verdict, whatever monies and benefits, including secret profits, the defendants had earned or derived under the management agreement until the time it was declared void had to be paid over to the trust as part of general damages (see paras 87–88, 101, 103, 140–141, 144, 151–152 & 156).

(10) The release of the RM7m by Messrs Sharifah & Associates to D1 was based solely on D4's written instruction as trustee of the trust. The other trustees did not sign the letter. As such, it was not a proper authorisation from the trust to the firm. Messrs Sharifah & Associates ought to have known that D1 had nothing to do with the sale and purchase agreements concerning the 27 units and there was no basis for them to release the RM7m to D1. But the firm nevertheless released the money blindly and recklessly to D1 without any adherence to conveyancing practice standards thus enabling D1 to wrongly take possession of the trust monies. Therein lay the firm's negligence and breach of duty of care as solicitors and breach of fiduciary duty as constructive trustees in relation to the trust's monies. The trial judge found D6 and D7 (the firm's partners) to be evasive, untruthful and not credible witnesses (see paras 109–113 & 116).

(11) D1's records revealed that the RM7m belonging to the trust was used unlawfully by its then directors, namely D2 and D3, to increase the paid-up capital of D1 by that amount and the said sum was also fraudulently shown in D1's audited accounts to have been released as a loan to D3 when there was no evidence that any such loan was given (see paras 129–130).

(12) The monthly repayments for D3's loans for his purchase of the additional 30 units were paid by the assignment to the financiers of the rental proceeds (earned by way of secret profits) from the 27 units belonging to the trust. This constituted fraud, unjust enrichment and/or monies had and received from the trust. In the absence of any plausible evidence in rebuttal from the defendants, the trial judge was correct in concluding that the additional 30 units were bought using the trust monies and that, consequently, the trust was the owner those units (see para 166).

(13) The receiver and manager's locus standi to sue and maintain the action against the defendants could not be questioned as it was derived from the explicit terms of the court order that appointed the receiver and manager. The issue of the locus standi was already decided in previous proceedings and was res judicata and the defendants were estopped from raising it again (see paras 41 & 49).

**[Bahasa Malaysia summary**

Keputusan mahkamah ini hanya berkaitan rayuan-rayuan oleh Virgin Properties Sdn Bhd ('D1'), Ku Azhar bin Ku Abdul Razak ('D2'), Dinesh Kanavaji a/l Kanawagi ('D3'), Tetuan Khana & Co ('D5') rakan kongsi suami isteri — iaitu, Riza Makhzan Arifin ('D6') dan Puteri Intan Nurul Arzian bt Abdul Aziz ('D7') — dari firma guaman Tetuan Sharifah & Associates, terhadap keputusan Mahkamah Tinggi yang menyebelahi Amanah Perkampungan Orang Asli Linggiu (Jakuns) ('amanah tersebut') yang bertindak melalui penerima dan pengurusnya ('plaintif'). Dua rayuan lain yang telah difailkan oleh Kanawagi a/l Seperumaniam ('D4') — yang merupakan salah seorang daripada pemegang amanah pertama amanah tersebut dan juga bapa D3 dan rakan kongsi bersama dalam D5 dan pengarah bersama dalam D1 — telah dibatalkan kerana kegagalannya, sebagai seorang bankrap, untuk memperoleh sanksi Ketua Pengarah Insolvensi untuk mendakwa dua rayuan itu. Genesis litigasi ini bermula apabila tiga perkampungan orang asli (Jakun) yang menduduki Lembah Linggiu di Johor kehilangan tanah nenek moyang mereka, di mana mereka bergantung kepada rezeki dan mata pencarian mereka, apabila kerajaan negeri Johor memperoleh sebahagian besar lembah tersebut untuk membina empangan. Sekumpulan orang asli yang terlibat ('pemohon') bagi pihak mereka sendiri dan bagi pihak penduduk kampung yang lain telah melantik D4 untuk menyaman pihak berkuasa untuk pampasan. Mahkamah Tinggi menganugerahkan RM26.5 juta sebagai pampasan. Lima tahun kemudian, apabila jumlah itu meningkat

kepada RM38,554,111.92 (termasuk faedah), Mahkamah Tinggi memerintahkan RM22 juta ('dana amanah') daripada jumlah tersebut dibayar ke dalam akaun amanah tersebut yang diuruskan oleh lima pemegang amanah (termasuk D4 ) dan baki RM16,554,111.92 yang kena dibayar kepada D5 untuk diagihkan kepada pemohon-pemohon selepas pelbagai potongan untuk bayaran guaman, kos, yuran perundingan dan perbelanjaan telah dibuat. Beberapa benefisiari amanah tersebut kemudian berjaya memohon kepada mahkamah untuk melantik plaintif sebagai penerima dan pengurus amanah tersebut sebagai pemegang amanah asal ('mantan pemegang amanah'). Dua tahun selepas pelantikannya, plaintif bagi pihak amanah tersebut, telah menyaman D1–D7 ('defendan-defendan tersebut') di Mahkamah Tinggi kerana pelbagai urus niaga fraud berkaitan hartanah amanah tersebut. Selain daripada fraud, tuntutan plaintif berpremiskan kecuaian, pengayaan yang tidak adil, konspirasi untuk mencederakan dengan cara yang menyalahi undang-undang dan pelanggaran kewajipan fidusiari, kewajipan berjaga-jaga dan kewajipan undang-undang dan juga profesional. Plaintif mempli bahawa berdasarkan resolusi yang diluluskan oleh bekas pemegang amanah, D4 menggunakan RM7 juta dana amanah untuk membeli 27 kondominium ('27 unit') atas namanya sendiri selepas mengarahkan Tetuan Sharifah & Associates, bertindak sebagai peguam untuk amanah tersebut dalam transaksi pembelian, untuk meremitkan jumlah tersebut kepada D1. D1 diperbadankan dengan modal berbayar RM2 dengan D3 dan D4 sebagai pengarah asal sebelum D2 menjadi pengarah apabila D4 kemudian meletak jawatan. D1 telah menandatangani perjanjian pengurusan dengan D4 yang membenarkan D1 memajak 27 unit selama 20 tahun dan, sebagai balasan, menyewakan hartanah tersebut kepada pihak ketiga pada kadar sewa yang dianggap sesuai. Apabila menerima RM7 juta dari Tetuan Sharifah & Associates, D1 menggunakan jumlah itu untuk menambah modal saham berbayarnya dengan jumlah tersebut dengan mengeluarkan tujuh juta lagi saham antara kedua-dua pengarahnya (D2 telah menjadi pengarah menggantikan D4 pada masa itu). D1 juga menggunakan RM7 juta untuk membayar RM628,080 kepada D4 (kononnya membayar balik untuk deposit yang telah dibayarnya untuk membeli 27 unit) dan membelanjakan RM619,200 untuk menjalankan kerja-kerja pengubahsuaian 27 unit tersebut. Plaintif mendakwa bahawa D3 juga telah menggunakan dana amanah tersebut untuk membeli lagi 30 unit kondominium ('30 unit tambahan') untuk dirinya sendiri memandangkan wang deposit untuk pembelian tersebut telah dibayar oleh D1 daripada pendapatan yang diperolehi daripada sewa 27 unit itu. Plaintif menyatakan bahawa perjanjian pengurusan itu dibuat untuk menipu amanah tersebut dan memperkayakan D1, D3 dan D4. Untuk memperoleh pampasan kerugian dan kerosakan yang telah ditanggung oleh amanah tersebut, plaintif menyaman defendan untuk, antara lain, ganti rugi, pengembalian wang dan harta kepunyaan amanah tersebut, dan deklarasi bahawa amanah tersebut memiliki 27 unit dan 30 unit tambahan dan bahawa perjanjian pengurusan tersebut adalah terbatal dan tidak sah. Selain menolak tuntutan ganti rugi teladan

terhadap defendan, Mahkamah Tinggi membenarkan semua relief lain yang dipohon oleh plaintif dan juga memerintahkan D1–D7 membayar plaintif RM10,432,334 untuk ganti rugi am. Angka ini terdiri daripada pemulangan jumlah yang disebut di atas sebanyak RM628,080 dan RM619,200, sewa yang diperolehi oleh D1 untuk 27 unit tersebut dan keuntungan rahsia lain yang telah diperoleh menggunakan dana amanah tersebut. Sebagai membalas kepada rayuan-rayuan oleh defendan terhadap keputusan Mahkamah Tinggi, plaintif memfailkan rayuan balas terhadap penolakan tuntutannya untuk ganti rugi teladan. Semasa rayuan masih menunggu perbicaraan, Malayan Banking Bhd ('MBB') campur tangan untuk menambah dirinya sebagai pihak kepada rayuan-rayuan tersebut dan berpendapat bahawa ia patut diisytiharkan sebagai pemilik 16 daripada 30 unit tambahan itu kerana telah membiayai pembelian D3 sebagai balasan penyerahan hak mutlak (bukan melalui gadaian) untuk 16 unit yang memihak kepadanya.

Dalam pembelaan mereka, defendan mengaku, antara lain, bahawa: (a) pembelian D4 untuk 27 unit itu dan pelepasan oleh Tetuan Sharifah & Associates untuk RM7 juta tersebut kepada D1 telah dibenarkan oleh resolusi yang diluluskan oleh mantan pemegang amanah; (b) 27 unit itu bukan untuk faedah peribadi D4 tetapi untuk kepentingan amanah tersebut; (c) tidak ada wang yang dimiliki oleh amanah tersebut telah digunakan untuk membeli 30 unit tambahan tersebut; (d) tidak ada kerugian disebabkan oleh amanah tersebut kerana 27 unit itu memperoleh pendapatan sewa untuk amanah tersebut; (e) D1 sebenarnya telah menggunakan RM619,200 untuk mengubahsuai 27 unit tersebut; (f) tidak ada wang milik amanah tersebut telah digunakan untuk menambah modal saham D1; (g) perjanjian pengurusan tersebut adalah sah kerana, menurutnya, semua sewa D1 yang diterima daripada 27 unit itu telah dibayar kepada akaun amanah tersebut; dan (h) amanah tersebut, sebagai entiti bukan undang-undang, tidak mempunyai kapasiti untuk menyaman defendan.

**Diputuskan**, sebulat suara menolak rayuan-rayuan, rayuan balas dan juga tuntutan MBB untuk pemilikan 16 daripada 30 unit tambahan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Tidak ada sebab untuk mengganggu dapatan fakta yang dibuat oleh hakim perbicaraan kerana beliau telah memberikan penghargaan kehakiman sepenuhnya dan mencukupi kepada keseluruhan keterangan, fakta dan kes pembelaan sebelum membuat keputusannya. Tiada pemakaian menyeluruh yang sewenang-wenangnya oleh hakim perbicaraan berhubung hujah plaintif dan ia adalah sangkaan tulen di pihak defendan untuk mencadangkan bahawa hakim tidak mengambil kira penghujahan untuk pembelaan. Hakim perbicaraan telah mempertimbangkan 12 laporan penerima dan laporan pengurus (yang tidak dipatahkan), perlakuan defendan dan sikap dan kredibiliti saksi-saksi. Beliau mendapati saksi-saksi pembelaan tidak mempunyai

kredibiliti dan tidak menimbulkan apa-apa beban kepada keterangan mereka. Khususnya, beliau mendapati bahawa D3, D4, D6 dan D7 adalah bersifat mengelak, tidak konsisten dan tidak benar. Tiada apa-apa dalam memorandum rayuan untuk mencadangkan atau meyakinkan mahkamah bahawa hakim perbicaraan telah terkhilaf atau salah dirinya dalam apa jua cara atau bahawa terdapat apa-apa isu yang mempunyai merit bagi mewajarkan pengakasan keputusan Mahkamah Tinggi (lihat perenggan 53, 197–198 & 201).

(2) Rayuan balas plaintif adalah cacat dan harus ditolak kerana ia jelas tiada kaitan dengan substans rayuan-rayuan defendan-defendan. Terdapat autoriti jelas untuk menunjukkan bahawa plaintif sepatutnya memfailkan notis rayuan berasingan mengenai penolakan tuntutannya untuk ganti rugi teladan. Sekiranya satu parti ingin mempersoalkan dapatan substantif mahkamah bawahan, ia perlu memfailkan notis rayuan yang sewajarnya dan tidak boleh ditimbulkan melalui rayuan balas yang tidak menjejaskan perayu asal. Walaupun atas merit, rayuan balas itu gagal. Kerugian yang dialami oleh amanah tersebut telah diberi pampasan secukupnya oleh perintah Mahkamah Tinggi melalui ganti rugi am dan ganti rugi lain. 27 unit dan 30 unit tambahan tersebut telah diisytiharkan sebagai aset amanah tersebut dan diperintahkan untuk dikembalikan kepadanya tanpa apa-apa kerugian tetapi sebaliknya dengan kenaikan nilai yang tidak dinafikan. Semua wang yang dibelanjakan daripada RM7 juta serta semua keuntungan rahsia yang diperoleh berikutan penarikan balik RM7 juta daripada tabung amanah telah diperintahkan untuk dikembalikan kepada amanah tersebut sebagai ganti rugi am berjumlah RM10,430,334. Berikutan perintah Mahkamah Tinggi, tabung amanah tersebut telah dibalas dengan sepenuhnya dan diberi pampasan secukupnya. Oleh itu, apa-apa award melalui ganti rugi teladan, yang bertujuan untuk menghukum defendan atas kesalahannya, adalah tidak wajar dalam keadaan tersebut (lihat perenggan 205–206).

(3) Hakim perbicaraan dengan betul mendapati bahawa surat ikatan penyerahhakan MBB bertarikh 4 Mac 2011 tidak sah berdasarkan fakta bahawa D3 hanya memperoleh haknya untuk 16 unit kondominium pada tahun 2015. Selain itu, penyerahhakan kepada MBB hanya memberinya gadaian yang saksama dengan hak untuk haling tebus jika berlaku kegagalan dan tidak menjadikannya 'pemilik' atau 'tuan punya' 16 unit tersebut. Jenis relief deklaratori yang dipohon oleh MBB bahawa ia adalah 'pemilik' 16 unit tersebut adalah tidak wajar (lihat perenggan 183 & 191–192).

(4) MBB tidak menunjukkan yang mana hakim perbicaraan telah terkhilaf atau bagaimana penghakimannya menyalahi undang-undang atau dibuat tanpa bidang kuasa dan justeru terbatal. Oleh itu, keputusan

hakim perbicaraan tidak boleh diketepikan. MBB tidak mempunyai kausa tindakan terhadap plaintif dan hanya memohon untuk mencabar penghakiman atas alasan bahawa ia adalah terbatal hanya kerana ia tidak dimasukkan sebagai pihak kepada saman itu. Pada hakikatnya, MBB hanya mempunyai tuntutan terhadap D3 sebagai pemberi pinjamannya dan 'penyerah hak' manakala penghakiman itu adalah antara amanah tersebut dan D3. Hak MBB terhadap D3 tidak terjejas dan, jika terjejas, ia patut dibicarakan dalam prosiding berasingan antara mereka. Jika MBB ingin menuntut 16 unit tersebut, ia sepatutnya memfailkan tuntutan baru terhadap D3 sebagai peminjam dan 'penyerah hak'nya (lihat perenggan 188, 190 & 193).

(5) Berdasarkan keterangan, hakim perbicaraan dengan betul mendapati D1 hingga D7 bertanggungjawab terhadap amanah tersebut untuk semua wang yang diperolehi bagi pihak amanah tersebut dan apa-apa aset yang diperoleh menggunakan wang yang diambil daripada tabung amanah tersebut. D4 bertanggungjawab sebagai pemegang amanah pada setiap masa matan manakala defendan-defendan yang lain menjadi pemegang amanah konstruktif berdasarkan urus niaga mereka dengan hartanah amanah tersebut. Kehilangan atau kerugian yang dialami oleh amanah tersebut jelas sama dan tidak boleh dibahagikan. Oleh itu, sama ada semua defendan adalah pelaku tort bersama atau tidak, masing-masing adalah bertanggungjawab untuk kerugian yang sama dan terpaksa membayar pampasan bagi keseluruhannya (lihat perenggan 3, 167 & 169).

(6) Dari masa itu (Julai 2000), Kerajaan Negeri Johor membayar tabung amanah sebanyak RM22 juta secara terus kepada D5 sebagai peguamcara yang bertindak untuk pemohon orang asli sehingga masa jumlah tersebut telah didepositkan dengan Amanah Raya Bhd pada tahun 2005, tiada apa-apa dikemukakan oleh D4 sebagai pemegang amanah kepada amanah tersebut tentang apa yang telah berlaku kepada RM22 juta dan faedah yang diperoleh daripadanya. Surat ikatan amanah menghendaki pemegang amanah untuk mengekalkan akaun-akaun yang sepatutnya dan kegagalan mereka berbuat demikian merupakan pelanggaran surat ikatan amanah itu (lihat perenggan 54–55).

(7) Walaupun defendan mengakui bahawa 27 unit adalah milik amanah tersebut, fakta menunjukkan bahawa perlakuan D4 adalah bertentangan dengan dan tidak konsisten dengan konsesi tersebut dan jelas menunjukkan niat untuk membeli 27 unit untuk dirinya sendiri. Tiada keterangan menunjukkan bahawa deposit tender sebanyak RM628,080 yang dibayar untuk pembelian 27 unit itu datang daripada wang D4 sendiri kerana keterangan dokumentar menunjukkan bahawa akaun bank peribadinya telah menerima faedah yang dihasilkan daripada RM22 juta amanah tersebut. Oleh itu, plaintif telah membuktikan

tuntutannya untuk pengembalian sebanyak RM628,080 sebagai sebahagian daripada ganti rugi am yang kena dibayar kepada amanah tersebut (lihat perenggan 63 & 69).

(8) Rekod D1 tidak menyokong, dan sebenarnya bercanggah, penegasan bahawa ia telah menggunakan RM619,200 daripada RM7 juta daripada tabung amanah itu untuk mengubahsuai 27 unit tersebut. D3 dan D4, sebagai pengarah-pengarah D1, tidak dapat menjelaskan keterangan dokumentar yang telah dikemukakan oleh mereka dalam cubaan untuk menunjukkan bahawa jumlah tersebut sebenarnya dibelanjakan untuk pengubahsuaian 27 unit itu. Dalam keadaan ini, hakim perbicaraan mendapati bahawa keterangan mereka tidak boleh dipercayai dan menolak keterangan mereka dan sewajarnya telah memutuskan bahawa RM619,200 perlu dikembalikan kepada plaintif sebagai sebahagian daripada ganti rugi am (lihat perenggan 75–76 & 78).

(9) Perjanjian pengurusan secara keseluruhan bukanlah urus niaga komersial yang adil kerana ia melibatkan terma-terma yang tidak adil dan mengandungi unsur-unsur penipuan, urus niaga sendiri dan pengayaan yang tidak adil. Terma-terma perjanjian pengurusan telah memudaratkan amanah tersebut yang mana kepentingannya sepatutnya dilindungi D1–D4 sebagai pemegang amanah/pemegang amanah konstruktif/fidusiari. Oleh kerana perjanjian pengurusan diisytiharkan tidak sah dari tarikh keputusan Mahkamah Tinggi, apa-apa wang dan faedah, termasuk keuntungan rahsia, yang mana defendan-defendan telah memperoleh atau diperoleh di bawah perjanjian pengurusan sehingga masa ia diisytiharkan tidak sah perlu dibayar kepada amanah tersebut sebagai sebahagian daripada ganti rugi am (lihat perenggan 87–88, 101, 103, 140–141, 144, 151–152 & 156).

(10) Pengeluaran RM7 juta oleh Tetuan Sharifah & Associates kepada D1 hanya berdasarkan arahan bertulis D4 sebagai pemegang amanah tersebut. Pemegang amanah lain tidak menandatangani surat itu. Oleh itu, ia bukan merupakan kebenaran yang sah daripada amanah tersebut kepada firma itu. Tetuan Sharifah & Associates sepatutnya mengetahui bahawa D1 tidak mempunyai apa-apa kaitan dengan perjanjian jual beli mengenai 27 unit itu dan tidak ada asas bagi mereka untuk melepaskan RM7 juta kepada D1. Namun firma tersebut bagaimanapun mengeluarkan wang secara membuta tuli dan melulu kepada D1 tanpa mematuhi piawaian amalan konveyansing dengan itu membolehkan D1 menyalahgunakan wang amanah tersebut. Di sini terdapat kecuaian firma dan pelanggaran kewajipan berjaga-jaga sebagai peguamcara dan pelanggaran tugas fidusiari sebagai pemegang amanah konstruktif berkaitan wang amanah tersebut. Hakim perbicaraan mendapati D6 dan

D7 (rakan kongsi firma) sebagai saksi-saksi yang mengelak, tidak jujur dan tidak boleh dipercayai (lihat perenggan 109–113 & 116).

(11) Rekod D1 mendedahkan bahawa RM7 juta kepunyaan amanah tersebut telah digunakan secara tidak sah oleh pengarah-pengarahnya iaitu D2 dan D3, untuk menambah modal berbayar D1 dengan jumlah itu dan jumlah tersebut juga telah ditunjukkan secara terang-terangan secara fraud dalam akaun diaudit D1 yang telah dibayar sebagai pinjaman kepada D3 walhal tiada keterangan bahawa pinjaman tersebut diberikan (lihat perenggan 129–130).

(12) Bayaran balik bulanan untuk pinjaman D3 bagi pembelian 30 unit tambahan telah dibayar melalui penyerahhakan kepada pembiaya hasil sewa (diperolehi melalui keuntungan rahsia) daripada 27 unit kepunyaan amanah tersebut. Ini merupakan penipuan, pengayaan tidak adil dan/atau wang yang telah diperoleh dan diterima daripada amanah tersebut. Tanpa keterangan yang munasabah dalam pematahan daripada defendan, hakim perbicaraan adalah betul dalam membuat kesimpulan bahawa 30 unit tambahan tersebut telah dibeli menggunakan wang amanah itu dan, oleh itu, amanah itu adalah pemilik unit tersebut (lihat perenggan 166).

(13) Locus standi penerima dan pengurus untuk menyaman dan mempertahankan tindakan terhadap defendan tidak boleh dipersoalkan kerana ia timbul daripada terma-terma eksplisit perintah mahkamah yang melantik penerima dan pengurus. Isu locus standi telahpun diputuskan dalam prosiding terdahulu dan adalah res judicata dan defendan diestop daripada menimbulkannya semula (lihat perenggan 41 & 49).]

**Notes**

For cases on trust property in general, see 12(2) *Mallal's Digest* (5th Ed, 2015) paras 3458–2477.

**Cases referred to**

*Amat Loyut & Ors v Saling Lau Bee Chiang & Ors (No 3)* [2014] 1 LNS 249, HC (refd)

*Ang Game Hong & Anor v Tee Kim Tiam & Ors* [2018] 4 MLJ 432, CA (refd)

*Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals* [2003] 1 MLJ 567, CA (refd)

*Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393, FC (refd)

*Damai Freight (M) Sdn Bhd v Affin Bank Bhd* [2015] 4 MLJ 149, FC (refd)

*English v Emery Reimbold & Strick Ltd; DJ & C Withers (Farms) Ltd v Ambic Equipment Ltd; Verrechia (trading as Freightmaster Commercials) v Commissioner of Police of the Metropolis* [2002] 3 All ER 385; [2002] EWCA Civ 605, CA (refd)

*Fawziah Holdings Sdn Bhd v Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) and another appeal* [2006] 1 MLJ 505; [2006] 1 CLJ 996, CA (not folld)

*Foo Sam Ming v Archi Environ Partnership* [2004] 1 MLJ 449; [2004] 1 CLJ 759, CA (refd)

*Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1, FC (refd)

*Hamit bin Matusin & Ors v Penguasa Tanah dan Survei & Anor and another appeal* [2006] 3 MLJ 289; [2006] 2 CLJ 251, CA (refd)

*Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149, SC (refd)

*Hurstanger Ltd v Wilson and another* [2007] 1 WLR 2351, CA (refd)

*Kabushiki Kaisha Ngu v Leisure Farm Corp Sdn Bhd & Ors* [2016] 5 MLJ 557, FC (refd)

*London Passenger Transport Board v Moscrop* [1942] AC 332, HL (refd)

*Malaysian National Insurance Sdn Bhd v Lim Tiok* [1997] 2 MLJ 165, SC (refd)

*Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374, FC (refd)

*Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268, FC (refd)

*PhileoAllied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor* [2002] 2 MLJ 513; [2002] 2 CLJ 621, FC (refd)

*Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360, HC (refd)

*Rookes v Barnard & Ors* [1964] AC 1129, HL (refd)

*Saling Lau Bee Chiang & Ors v Kanawagi Seperumaniam & Ors* [2010] 8 CLJ 347, HC (refd)

*Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1; [2015] 8 CLJ 944, FC (refd)

*Selvam Holdings (Malaysia) Sdn Bhd v Grant Kenyon & Eckhardt Sdn Bhd (BSN Commercial Bank Malaysia Bhd & Ors, interveners)* [2003] 1 MLJ 251, HC (refd)

*Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd* [2013] 5 MLJ 1, FC (refd)

*Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185, SC (refd)

*Tan Sri Dato' Dr Awang Had bin Salleh & Anor v Dato' Dr Haji Mohamed Haniffa bin Haji Abdullah* [2007] 6 MLJ 293; [2007] 5 CLJ 565, CA (refd)

*Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor* [1995] 1 MLJ 668, CA (refd)

*UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2018] Supp MLJ 363; [2010] 9 CLJ 785, FC (refd)
*Zulkiflee bin Abdul Samad v Segi Objektif (M) Sdn Bhd* [2016] MLJU 1333, CA (refd)

**Legislation referred to**

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 3, 3(1), 51, 51(1A), 54, 54(3)
Bankruptcy Act 1967 (now Insolvency Act 1967) s 38(1)(a)
Civil Law Act 1956 s 4(3)
Companies Act 1965 ss 54, 67, 364(2)
Companies Regulations 1966 Forms 11, 24, 28
National Land Code s 344(1), (3)
Partnership Act 1961
Rules of Court 2012 O 18 r 19
Rules of the Court of Appeal 1994 r 5

**Appeal from:** Civil Suit Nos 23NCVC-106–07 of 2012 and 22–228 of 2009 (High Court, Johor Bahru)

*TA Sivam (Vinoshini Narayanasamy and Dinesh Athinarayanan with him) (Nagarajan Peri & Co) in Civil Appeal Nos J-02(W)-219–02 of 2017 and J-02(W)-226–02 of 2017 for the appellant.*
*Manjeet Singh Dhillon (Ranjan Chandran, Shopna Rani Malakar, TA Sivam, Shobah Veera and Dinesh Athinarayanan with him) (Hakem Arabi & Assoc) in Civil Appeal No J-02(W)-220–02 of 2017 for the appellant.*
*Bastian Vendargon (Gene Anand Vendargon, TA Sivam and Dinesh Athinarayanan with him) (Bastian Vendargon) in Civil Appeal No J-02(W)-221–02 of 2017 for the appellant.*
*Vishwanathan (Nadesh Ganabaskaran and TA Sivam with him) (Malek, Paulian & Gan) in Civil Appeal No J-02(W)-224–02 of 2017 for the appellant.*
*Dinesh Athinarayanan (Sathyananthan Sinnappan and TA Sivam with him) (Dinesh & Co) in Civil Appeal No J-02(W)-225–02 of 2017 for the appellant.*
*Yong Jia Wei (Annou Xavier and TA Sivam with him) (Azri, Lee Swee Seng & Co) in Civil Appeal No J-02(W)-227–02 of 2017 for the appellant.*
*Wong Rhen Yen (Ahmad Ezmeel bin Ahmad Tarmizi and TA Sivam with him) (Dennis, Nik & Wong) in Civil Appeal No J-02(W)-228–02 of 2017 for the appellant.*
*Gurdial Singh (Ragumaren Gopal, Abraham Au, Kenneth Koh and Ragunath Kesavan with him) (G Ragumaren & Co); Karnan a/l Rajanthiran (Firdaus Azlina & Co) in Civil Appeal Nos J-02(W)-219–02 of 2017, J-02(W)-220–02 of 2017 and J-02(W)-221–02 of 2017 for the respondent.*

*Prakash Menon (Renu Zechariah and Ng Thiang with him) (Rosley Zechariah) in Civil Appeal No J-02(W)-224–02 of 2017, J-02(W)-225–02 of 2017, J-02(W)-226–02 of 2017, J-02(W)-227–02 of 2017 and J-02(W)-228–02 of 2017 for the respondent.*

*Arun Kasi (Nurul Azree Nawi with him) (Nadzifah Sugunthala & Assoc) in Civil Appeal No J-02(W)-228–02 of 2017 for the intervener.*

**Idrus Harun JCA (delivering judgment of the court):**

INTRODUCTION

**[1]** These appeals are directed against the decisions of the High Court in Johor Bahru involving Civil Suit No 22–228 of 2009 ('the 228 Suit') and Civil Suit No 23NCVC-106–07 of 2012 ('the 106 Suit'). One noteworthy feature of these two suits which deserves early mention is that the 106 Suit was originally filed in the Kuala Lumpur High Court as Civil Suit No MTKL-22 NCC-1512–09 of 2011 but was subsequently transferred to the High Court in Johor Bahru and registered as the 106 Suit. Both the 228 Suit and the 106 Suit were ordered to be consolidated and heard together by this court on 19 June 2012 pursuant to which the two suits proceeded in the Johor Bahru High Court in that manner. It is also necessary to mention that the 228 Suit was filed in 2009 whilst the 106 Suit was filed in 2011. The trial in the court below commenced on 1 October 2012 and ended on 23 May 2016. After a full trial, the High Court delivered its decision on 22 December 2016 allowing the claims by the plaintiffs in both suits. The learned judge furnished two separate grounds of judgment, one for each suit.

**[2]** There are ten separate appeals filed to this court arising from the above High Court's decisions. We heard these appeals together. These appeals are:

(a) J-02(NCVC)(W)-219–02 of 2017 ('the 219 Appeal');

(b) J-02(NCVC)(W)-220–02 of 2017 ('the 220 Appeal');

(c) J-02(NCVC)(W)-221–02 of 2017 ('the 221 Appeal');

(d) J-02(NCVC)(W)-222–02 of 2017 ('the 222 Appeal');

(e) J-02(NCVC)(W)-223–02 of 2017 ('the 223 Appeal');

(f) J-02(NCVC)(W)-224–02 of 2017 ('the 224 Appeal');

(g) J-02(NCVC)(W)-225–02 of 2017 ('the 225 Appeal');

(h) J-02(NCVC)(W)-226–02 of 2017 ('the 226 Appeal');

(i) J-02(NCVC)(W)-227–02 of 2017 ('the 227 Appeal'); and

(j) J-02(NCVC)(W)-228–02 of 2017 ('the 228 Appeal').

The first four appeals and the last six appeals originated from the High Court's decisions in the 228 Suit and the 106 Suit respectively.

**[3]** Further mention must also be made to the fact that the 222 Appeal and the 223 Appeal were struck out by this court on 11 December 2017 and 14 December 2017 respectively for want of sanction under s 38(1)(a) of the Bankruptcy Act 1967 since the appellant in both appeals namely Kanawagi a/l Seperumaniam, the first defendant in the 228 Suit and the fourth defendant in the 106 Suit, had been adjudged a bankrupt on 30 May 2013. The motions for leave to file an appeal to the Federal Court in respect of the 222 Appeal and the 223 Appeal were respectively dismissed by the said court on 26 September 2018 and 29 October 2018. Therefore, as it stands now, insofar as the 228 Suit and the 106 Suit are concerned, the fourth defendant is bound by the decisions and orders of the High Court in both suits ergo these decisions and orders remain intact. In other words, where the learned judge made his decision in the 106 Suit from which these five appeals arise, the decision against the fourth defendant binds him and it is not open to this court to reverse the decision because the learned judge had made specific findings against him. Likewise, any decision made by this court against the other defendants in the 224–228 Appeals and where it concerns the fourth defendant will inevitably bind him as well and each of the defendants is liable for the same damage and must also compensate for the whole of it. The learned judge in this regard found all the defendants liable for causing the same and indivisible damage to the trust. His Lordship's findings clearly linked every defendant and hence every other appeal herein. The Federal Court's decision in the case of *Malaysian National Insurance Sdn Bhd v Lim Tiok* [1997] 2 MLJ 165 is the authority on this point. We shall deal with this issue of the liability of the defendants later in our judgment.

**[4]** Before proceeding further, we would like to make it very clear that these grounds of judgment are furnished for the 224–228 Appeals which appeals arise from the decision of the High Court in the 106 Suit. The grounds of judgment in respect of the 219–221 Appeals emanating from the decision of the High Court in the 228 Suit are provided separately. The hearing of these appeals before us took a total of 15 days on diverse dates in the months of February, July, August, October and November 2018. At the conclusion of the arguments, we indicated to learned counsel for the respective parties that we needed time to consider these appeals and the submissions made thereon. We shall now proceed to give our decision and our reasons now follow which constitute the judgment of this court.

A PRELUDE

**[5]** For ease of reference, the appellants and the respondents herein will be referred to as the respective defendants and plaintiff as their position in the High Court. As a convenient starting point, it is appropriate to state that the B series of events serving as a prelude to this full-fledged action in the 106 Suit began in 1990. In that year, the State Government of Johor acquired 53,282 hectares of land in Linggiu Valley located in the District of Kota Tinggi, Johor for the purposes of the construction of a dam known as the Linggiu Valley Dam to supply water to Singapore pursuant to an agreement with the Government C of the Republic of Singapore entered into in the same year. The acquisition of the land affected mainly three Orang Asli Jakun's villages namely Kampung Sayong Pinang, Kampung Semanggar and Kampung Pasir Intan situated on the said land.

D

**[6]** In accordance with the said agreement, the State Government of Johor was required to surrender possession of the Sg Linggiu catchment area ('the said parcel of land') to the Singapore Government to enable it to construct the dam. In return thereof, the Government of Singapore paid RM320m to the State E Government of Johor. These three villages were occupied by Orang Asli (including some of the plaintiffs in the 219, 220 and 221 Appeals) and their ancestors had in fact lived there for many years. To enable the State Government of Johor to hand over possession of the said parcel of land, the *orang asli* living there had to be evicted, resulting in, inter alia, loss of their F native ancestral land and deprivation of livelihood.

**[7]** What had emerged from these events subsequently was that 52 *orang asli* were keen to obtain fair compensation from the State Government of Johor by commencing legal proceedings. Thus, on 4 October 1994, a representative G action was initiated by the 52 *orang asli* plaintiffs (being the heads of families) on behalf of 424 *orang asli* vide Originating Summons No 24–828 of 1994 ('the 828 Suit') against the State Government of Johor and the Pengarah Tanah Dan Galian Johor ('PTG Johor') to obtain compensation for the losses the *orang asli* had suffered. On 19 December 1995, the Johor Bahru High Court H gave judgment in favour of the 52 *orang asli* and ordered that the sum RM26.5m be paid as compensation to them but did not award interests or costs.

**[8]** The State Government of Johor and the PTG Johor appealed to this I court on the award of compensation, and the *orang asli* cross-appealed on the failure to award interests and costs. On 19 November 1997, this court dismissed the appeal, affirmed the decision of the High Court on liability and quantum and allowed the cross-appeal by the *orang asli*. The State Government of Johor and the PTG Johor then on 19 November 1997 obtained leave to

appeal to the Federal Court against the decision of the Court of Appeal. However, their appeal in the Federal Court was subsequently dismissed on 21 March 2000.

**[9]** Thereafter, the *orang asli* filed an application in the Johor Bahru High Court seeking, inter alia, to set up a trust to manage the compensation monies. Pursuant thereto, the High Court, on 5 June 2000 made, inter alia, the following orders ('the trust order'):

(a) the State of Government of Johor to pay the compensation together with interest accrued amounting to RM38,554,111.92;

(b) a sum of RM22m from the compensation monies awarded be paid directly into the said trust upon notification of its establishment;

(c) a trust be established under the name of Linggiu Valley Orang Asli (Jakuns) Trust ('the said trust');

(d) a deed of trust was declared and sanctioned which stipulates, amongst others, that the duration of the said trust shall be for a period of 25 years from the date of the trust order;

(e) Tok Batin Adong bin Kuwau ('Adong'), Tok Batin Abdul Rahman bin Abdullah ('Abdul Rahman') and Kanawagi a/l Seperumaniam ('the fourth defendant') be appointed the first trustees, and who shall execute the deed of trust;

(f) the Director General of Jabatan Hal Ehwal Orang Asli, Malaysia ('JHEOA'), Kuala Lumpur for the time being shall be appointed as the additional trustee; and

(g) the balance of the compensation monies awarded inclusive of interest be paid to the legal firm of Messrs Khana & Co ('the fifth defendant') for distribution to the *orang asli* after deduction and payment of all legal fees, costs, consultation fees and expenses included.

**[10]** Pursuant to the trust order aforesaid, a deed of trust was prepared and executed on 5 June 2000. The deed of trust provides for the terms and conditions for the manner in which the trust is to be managed by the appointed trustees. The salient terms of the deed of trust are:

(a) the RM22m would be kept in trust for the 52 *orang asli* and their descendants, but no child descendant shall be entitled to any share or distribution of the assets or income during the lifetime of his or her parent;

(b) the trustees shall be Adong, Abdul Rahman, the fourth defendant, as the first trustees, the Director General of JHEOA, and one independent person;

(c) RM900 per month to be paid to the beneficiaries of the trust from the RM22m; and

(d) the trustees to maintain proper accounts.

**[11]** Thereafter, the State Government of Johor made payment of the compensation awarded including interest in accordance with the trust order of which RM22m was paid to the trust and RM16,554,111.97 was paid to the fifth defendant. In the meantime, Tok Batin Daud a/l Kadir ('Daud') was appointed by the three *orang asli* communities on 6 January 2001 as an additional trustee. On 8 March 2007, Tok Batin Abdul Rahman died.

**[12]** In the subsequent events that happened, on 25 March 2009, several beneficiaries of the trust filed an action vide the 228 Suit and obtained an ex parte order on 17 April 2009, appointing Ng Eng Kiat of Folks Corporate Services Sdn Bhd as the receiver and manager of the trust ('the R&M') in place of the fourth defendant (the appellant in the 223 Appeal), Adong and Daud who were the former trustees of the trust (the former trustees). The order which was granted by Vernon Ong J ('Vernon Ong's order') required the R&M to receive and manage the assets constituting the trust and the judgment sum awarded in the 828 Suit. Thereafter, the order was extended on an ad interim basis on 5 May 2009 and 4 June 2009 and confirmed on an inter partes basis on 11 September 2009. The appointment of the R&M was stated in the said Vernon Ong's order to take effect and be effective until the disposal of the 228 Suit. Adong and Daud have since died.

**[13]** In 2011, pursuant to the powers given to him by the High Court, the R&M filed the 106 Suit for and on behalf of the trust.

THE CLAIM

**[14]** To appreciate the rival contentions and issues that have been raised before this court it would be desirable to state in great detail the material facts. In this action it is the plaintiff's pleaded case that the fourth defendant purchased 27 units of condominium in Lanai Gurney Heights Condominium situated at No 1, Jalan Padang Tembak, Off Jalan Bukit Keramat, Kuala Lumpur ('the 27 units'). The 27 units were purchased on 1 August 2008 using RM7m withdrawn from the trust. Before the purchase of the 27 units was carried out, on 21 January 2008, a resolution was purportedly passed by the former trustees which amongst others authorised the fourth defendant as trustee of the trust to be empowered to purchase the properties in his name and hold the same in trust on behalf of the trust and make a statutory declaration to that effect.

**[15]** On or about 25 January 2008, the fourth defendant appears to have

tendered for his own personal benefit and in his own name to purchase the 27 units from their owner and vendor namely Delta Odyssey Sdn Bhd ('DOSB') at the tender price of RM6,280,800. The fourth defendant on the same date appears to have paid the tender deposit of RM628,080 ('tender deposit') to the Receivers and Managers of DOSB by way of a cheque drawn from an account of Bank Pertanian Malaysia. The fourth defendant's tender was submitted by the fifth defendant (the appellant in the 226 Appeal) to Bank Perusahaan Kecil & Sederhana Malaysia Bhd ('SME Bank'), DOSB's financiers and assignees of the 27 units. SME Bank in turn agreed to accept the fourth defendant's tender at the price of RM6,380,800. On 2 May 2008, 27 sale and purchase agreements ('27 SPAs') were signed between DOSB and the fourth defendant in his own name allegedly for his own benefit. Nowhere in the 27 SPAs was it stated that the fourth defendant had purchased the 27 units for the benefit of the trust. The fourth defendant had also not produced the statutory declaration to the effect that he had purchased the 27 units in his own name and holds the same for the benefit of the trust as expressly required by the resolution dated 21 January 2008 referred to above.

**[16]** The solicitors acting for DOSB and the fourth defendant in the sale and purchase of the 27 units were Messrs Aziz Zakaria Shaiful & Wan ('Messrs Aziz Zakaria') and the fifth defendant respectively. On the other hand, the solicitors acting for the trust were the sixth and seventh defendants' firm namely Messrs Sharifah & Associates.

**[17]** Subsequently on 14 July 2008, a resolution purportedly by the former trustees was passed and forwarded to Amanah Raya Bhd ('ARB') instructing ARB to release RM7m from the trust's funds for the purchase of the 27 units and ARB was instructed to remit the said sum of RM7m by telegraphic transfer to the account of Messrs Sharifah & Associates. A resolution purportedly by the former trustees was also passed on the same date to appoint Messrs Sharifah & Associates as solicitors for the trust with respect to the purchase of the 27 units and to do whatever necessary and all ancillary matters for the completion of the sale. At all material times, the sixth and seventh defendants were the partners of Messrs Sharifah & Associates.

**[18]** On 1 August 2008, ARB released the amount of RM7m to Messrs Sharifah & Associates as instructed for the purchase of the 27 units. On 4 August 2008, the fourth defendant in his personal capacity instructed Messrs Sharifah & Associates to remit the entire sum of RM7m to the first defendant for onward payment towards the balance purchase price and any outstanding payments pertaining to the 27 SPAs. Messrs Sharifah & Associates through the sixth and seventh defendants released the sum of RM7m to the first defendant on 11 August 2008. It is also alleged that the release of the money was made by the firm without any covering letter and without taking

any protective measures of securing any undertaking for the benefit of the trust in the event the sale did not to go through and the cheque appears to have been acknowledged receipt by the third defendant, the appellant in the 221 Appeal.

**[19]** The first defendant, it is further alleged, caused to be prepared a banker's cheque for the sum of RM5,752,720 in favour of Messrs Aziz Zakaria on 7 August 2008. The aforesaid sum was said to be the balance of the agreed tender price for the purchase of the 27 units. On the same day, the said banker's cheque was forwarded by the first defendant to the fifth defendant for onward transmission to Messrs Aziz Zakaria.

**[20]** On or about 11 August 2008, the first defendant through the fifth defendant caused to be issued from the RM7m released to them, a payment by cheque amounting to RM628,080 in favour of the fourth defendant being the alleged repayment of the tender deposit sum paid on 25 January 2008. The remainder sum of RM619,200 from the RM7m was purportedly utilised to pay the first defendant to provide and undertake renovation works for the 27 units in accordance with the terms of a management agreement executed between the first defendant and the fourth defendant on 3 May 2008.

**[21]** To continue the narrative of the plaintiff's claim, the first defendant was incorporated on 5 April 2007 with an initial paid up capital of RM2. The third and fourth defendants were both appointed directors of the first defendant with effect from 3 October 2007. The second defendant was appointed a director of the first defendant with effect from 29 February 2008. However, the fourth defendant resigned as a director of the first defendant with effect from 29 February 2008. At a general meeting of the first defendant held on 29 February 2008, the directors were authorised to issue and allot further shares out of the unissued capital of the first defendant. On 29 February 2008, the directors issued and allotted a further 30,000 shares in the first defendant. The total issued capital of the first defendant as at the said date therefore stood at 30,002 share of RM1 each.

**[22]** At a general meeting of the first defendant held on 13 August 2008, to be exact nine days after the sum of RM7m was released to the first defendant on 4 August 2008, the authorised share capital of the first defendant was increased to RM10mn (divided into 10,000,000 ordinary shares of RM1 each). On the same day, the directors issued and allotted a further 7 million shares in the first defendant to the second and third defendants in respect of which each of them was respectively allotted 3,570,000 and 3,430,000 shares. The total issued capital of the first defendant as at 13 August 2008 therefore stood at 7,030,002 shares of RM1 each and out of which 3,585,300 shares were held by the second defendant, 3,442,001 shares were held by the third defendant and 2,701 shares were held by the fourth defendant. Sometime after 30 June 2009, the fourth

defendant is alleged to have transferred his shares in the first defendant to his son and partner, the third defendant. Consequently, the increase in paid up capital of RM7m on 13 August 2008 is reflected in the audited financial statements of the first defendant as at 30 June 2009. However, the audited financial statements of the first defendant as at 30 June2009 also disclosed an 'Amount due from directors' of RM6,775,959. The first defendant has advanced the said sum to its directors free of interest, without fixed terms of payment and on an unsecured basis and the plaintiff alleges that this sum is from the trust money of RM7m that was withdrawn from the trust.

**[23]** In another event which occurred, on 3 May 2008 the fourth defendant entered into the management agreement with the first defendant. The said management agreement provides that in consideration of the fact that the first defendant had negotiated and managed to procure the purchase of the 27 units at 40% below the market value, the fourth defendant, shall leaseback the 27 units to the first defendant for a period of 20 years commencing three months from the date of the management agreement, that the first defendant shall be entitled to lease and let the 27 units together with all its fixtures, furniture, fittings and chattels to third parties on such rent and terms and conditions as the first defendant thought fit and appropriate and in the event of a breach by the fourth defendant, leading to the termination of the management agreement, liquidated and ascertained damages in the sum of RM1m shall be paid to the first defendant.

**[24]** The plaintiff next avers that the terms of the management agreement are totally one sided, constitutes self-dealing, is in favour of the first defendant and there is also nothing in the management agreement which compels or obliges the first defendant to make any payment with regard to the 27 units at all as the first defendant's obligation to pay the monthly leaseback sum of RM26,587 arises if and only if there are any monies left over after taking into consideration all and any expenses incurred for the 27 units, which expenses are to be borne by the trust. It is also pleaded that there is a total failure of consideration and/or that the consideration is bad and/or that the said management agreement was entered into fraudulently between the first and fourth defendants, is self-dealing and is to unlawfully enrich themselves, to the detriment of the trust and resulting in loss to the trust.

**[25]** It is also asserted that upon the appointment of the R&M pursuant to the Vernon Ong's order in the 228 Suit, the fourth defendant was forced to and did inform the R&M on 24 April 2009 that he had purchased the 27 units for the trust and that if such order had not been obtained, the actual purchaser of the 27 units would have remained as the fourth defendant, with the fourth defendant having fraudulently utilised the trust funds to make such purchase

for his own benefit and entered into the management agreement to benefit the first defendant with the assistance of the fifth, sixth and seventh defendants.

**[26]** The plaintiff further states that the management agreement was fraudulently and unlawfully entered into between the first defendant and fourth defendant for their own ultimate benefit and to the detriment of the trust and that both of them have committed fraud on and conspired to injure the trust by unlawful means and have inserted unfair and unlawful terms in their own self-interest and for self-dealing, to the complete detriment of and loss to the trust.

**[27]** The plaintiff additionally also pleads that first defendant had after receiving the sum of RM7m from the trust and after having increased its share capital by that amount agreed to buy additional 30 units at the said Lanai Gurney Heights Condominium from a company by the name of Idaman Spektra Sdn Bhd at the price of RM6,283,000.

**[28]** By reason of the above facts, the first to seventh defendants unlawfully conspired with each other to injure the plaintiff by unlawful means, had breached their fiduciary obligations, alternatively had breached their duty to take care, duty of trust, duty of care and a statutory duty to the plaintiff and wrongfully had and received monies.

**[29]** Based on the narrative of events as aforesaid, the plaintiff is candid in its assertion that it has suffered loss and damage. As regards the sixth and seventh defendants, it is alleged that they were in breach of their legal and professional duties owed to the plaintiff and were negligent. The plaintiff in the event seeks before the court various reliefs which include declaratory and injunctive reliefs, various reliefs relating to specific performance, accounts, tracing of monies, damages, interest and cost. In summary, the plaintiff claims for recovery of the trust monies and assets which the appellants had wrongfully misappropriated, unlawfully, dishonestly and negligently used for their own unlawful enrichment. The prominent component of these reliefs are the remedies of declaration that the plaintiff is the owner of the 27 units and additional 30 units, the handing over of the said 27 units and additional 30 units to the plaintiff and that the management agreement is null and void.

THE DEFENCE

**[30]** The second, third, fourth, sixth and seventh defendants filed their own statement of defence whereas the first and fifth defendants filed a separate statement of defence. In essence, the defendants in their rebuttals, plead that on 21 January 2008, a resolution was passed by the former trustees and was signed by all the trustees at that material time. The said resolution was made pursuant

to powers given to them by the trust deed and the court order dated 5 June 2000. Pursuant to the said resolution, on 25 January 2008, the fourth defendant on behalf of the trust tendered for the 27 units at the tender price of RM6,280,800 and agreed to use his money from his own fund as a loan to the trust as a 10% deposit for the tender. The 27 SPAs were signed by the fourth defendant in his own name but not for his own benefit when it is clear from the deed of assignments and the resolution dated 21 January 2008 that the fourth defendant is holding the 27 units in trust for the trust.

**[31]** As regards the plaintiff's allegation that the fourth defendant instructed Messrs Sharifah & Associates to remit the sum of RM7m to the first defendant in his personal capacity, the defendants aver that the fourth defendant did not instruct Messrs Sharifah & Associates in his personal capacity and the instructions came from the then Trustees of the plaintiff and the said letter of 4 August 2008 will provide the evidence of the same. Messrs Sharifah & Associates through the sixth and seventh defendants released the purchase sum to the first defendant pursuant to the instructions of the trustees for the first defendant to complete the sale and purchase transaction of the 27 units for the benefit of the trust bearing in mind that time was an essence. The defendants deny that the sixth and seventh defendants were negligent or acted negligently and therefore caused loss to the trust. In actual fact there has been no loss to the trust and the 27 units have been secured for the benefit of the trust and the trust has now earned almost RM1m from the leaseback rent from the first defendant. The plaintiff has not proven any loss has been incurred to the trust but has merely speculated for the last 2 1/2 years on the losses when there was none.

**[32]** The remainder sum of RM619,200 was retained by the first defendant for renovation purposes pursuant to the management agreement dated 3 May 2008. Renovation for the 27 units took place since February 2008 itself after delivery of vacant possession and most of the money retained was used to pay debtors who had provided their services for the renovation work in credit hence the renovation sum was fully utilised in the month of August 2008 itself as the credit line was past due.

**[33]** With reference to an increase in share capital of the first defendant, the defendants claim that the RM7m paid by the trust to the first defendant was not used by the first defendant in any way whatsoever except pursuant to the resolution of the trust and that the RM7m shares issued to the second and third defendant were not derived from the RM7m paid by the trust to the first defendant. They further state that the amount due from the directors to the first defendant amounting to RM6,775,959 is not the monies received from the trust as it is obvious from the resolution dated 3 August 2008 which shows that monies received from the trust were utilised as follows:

(a) RM5,752,720 to be paid to Messrs Aziz Zakaria;

(b) RM628,080 to be paid to the fourth defendant; and

(c) RM619,200 to be retained by the first defendant for the purpose of renovation of the 27 units in accordance with the management agreement.

The increase of share capital was done by way of an undertaking given by the third defendant to reimburse the first defendant of RM7m.

**[34]** Turning now to the management agreement, it is the defendants' position that from the date of inception of the management agreement, all payments of leaseback rental have been made to the plaintiff's account. These payment were made beginning the month of August 2008, eight months before the R&M was appointed. At all material times and pursuant to the resolution entered by the trustees, it was clear that the trustees had entered into the management agreement with the first defendant for the benefit of the trust. If this is not the case, why would the first defendant pay the trust RM26,587 beginning August 2008–September 2011 totalling almost RM1m and these payments were confirmed by the R&M in his report to the High Court. In fact, the management agreement is fair and the first defendant has paid the monthly sum of RM26,587 for the last three years. By virtue of such payments there is no failure of consideration, the consideration was not bad in any way and the management agreement was not entered into fraudulently by the first and fourth defendants and/or the trustees. It instead provides a monthly income to the trust and in which case the financial institution in this country could not provide the same fixed rate of 5% returns on the purchase price on a monthly basis.

**[35]** The defence also deals with the plaintiff's allegation on the purchase of the additional 30 units in which the defendants adopt the position that the purchase of the additional 30 units has nothing to do with the plaintiff and neither any monies of the trust were used to purchase the said additional 30 units. The RM7m received by the first defendant was wholly used to purchase the 27 units for the benefit of the trust and the said amount was never utilised to purchase the additional 30 units.

**[36]** It ought to be mentioned that the defendants further in their defence aver that the R&M's action is an abuse of the court's process as the plaintiff is a non-legal entity. As such, the defendants stressed, the plaintiff as a non-legal entity could not have any cause of action. Finally, the defendants deny breaching any obligation as alleged by the plaintiff.

THE HIGH COURT'S DECISION

**[37]** The learned judge delivered his decision on 22 December 2016 allowing the plaintiff's claim granting almost all reliefs sought by the plaintiff which include declarations that the plaintiff is the owner of the 27 units as well as the additional 30 units and the management agreement is null and void. It is also important for this court to highlight that as far as the remedy of damages is concerned, the learned judge ordered the first to seventh defendants to pay the plaintiff general damages as set out below:

(a) the sum of RM7,540,625;

(b) the sum of RM1,010,306 being rental due for the 27 units from May 2013–June 2016 and continuing at the rate of RM26,587 per month from July 2016 until the date of the handing over and/or vacant possession; and

(c) the sums of RM628,080, RM619,200, RM27,000, RM34,650,00 and RM572,473.

The learned judge also granted the plaintiff's claim for ancillary reliefs.

**[38]** The consolidated trial of both the 106 Suit and the 228 Suit was conducted over 75 days. It is perhaps convenient to state at this point that the purchase of the 27 units using RM7m of the trust money withdrawn from the trust fund, the purchase of the additional 30 units, the management agreement between the fourth defendant and the first defendant, the increase of share capital of the first defendant and the allegation of receipt of secret profits, fraud or conspiracy to injure, breach of fiduciary obligations and breach of duty to take care, duty of care and statutory duty form the essence and most significant part of the plaintiff's gravamen in their claim against the eight defendants in this action. The case of the plaintiff in fact turns on the above complaints that the defendants against whom the allegations were made were liable for the reliefs sought in the court below. The High Court as earlier stated allowed the respondent's claim against the defendants. This is the decision under appeal herein. Before us, the appeals by all the six defendants revolve around and are directed against these complaints raising in consequence several pertinent issues for our determination. We would necessarily mention that the plaintiff has also filed a cross-appeal for exemplary damages which has been claimed but not granted by the learned judge. Whilst these appeals were pending hearing, the intervener, namely Malayan Banking Bhd had been made a party to the 228 Appeal by this court. The intervener's claim is with regard to their alleged claim on 16 units of the Lanai Gurney Apartments out of the additional 30 units the purchase whereof by the appellants has been financed by the intervener.

A LOCUS STANDI OF THE R&M

**[39]** This is the first of the defence principal contentions which raises a question of great importance to their case. The issue raised begs the question whether the plaintiff, being the trust, has locus standi to bring this action in court. Learned counsel for the first defendant (the appellant in the 224 Appeal) submitted that the defendants in fact objected on the plaintiff's locus which was their pleaded case clearly and unequivocally averred in para 7 of the statement of defence to the effect that the plaintiff is a non-legal entity and therefore cannot have any cause of action.

**[40]** It is of some significance to observe that the argument of the defendants in substance is that the learned judge failed to consider the legal issue of whether a trust has the locus standi to bring an action in court. It is very clear in the intitulement that the named plaintiff is the trust, although the 106 Suit was filed on the instruction of the R&M. The plaintiff, learned counsel submitted, does not say that the plaintiff is the R&M (acting on behalf and for the trust). This means that any award or order will be in the name of the trust and not the R&M. It is further submitted for the appellants that the proper party to sue as plaintiff ought to have been the R&M or at the least, the beneficiaries of the trust, which is not the case here. The trust, learned counsel emphasised, was not a legal persona but was a legal institution, sui generis. It is further submitted that the plaintiff has no locus standi as there is a final ruling by Hue Siew Kheng J in Kuala Lumpur High Court Civil Suit No 24NCVC-2983–11 of 2012 that the same plaintiff has no locus standi to sue and an appeal against this decision to this court was withdrawn by which reason the law of res judicata operates as against the same plaintiff in this suit.

**[41]** What is immediately apparent on a quick perusal of the terms of the appointment of the R&M pursuant to the Vernon Ong's order is that the R&M shall have the powers and duties as specified in Schedule 1 thereto. Paragraph 19 of Schedule 1, inter alia, empowers the R&M to commence, continue, defend or otherwise participate in any legal proceeding and to make applications to the court in order to enforce or protect the rights and interests of the trust. In an application vide encl 402 of Johor Bahru High Court Civil Suit No MT1–22–228 of 2009, Kamardin J in His Lordship's decision dated 3 February 2012 held that the R&M had the capacity and was empowered to commence, continue, defend and participate in any proceedings including the filing of affidavits and the Civil Suit in Kuala Lumpur High Court Civil Suit No 22NCVC-1512–9 of 2011. We would reiterate that the said 1512 Suit, as earlier mentioned, had been transferred to the Johor Bahru High Court and subsequently registered as the 106 Suit. In our judgment, it is beyond question that the R&M's locus standi or capacity to bring the 106 Suit is derived from the explicit terms of the Vernon Ong's order and this was affirmed by the High

Court in its decision on 3 February 2012. The issue had already been decided in the above unsuccessful challenge and is therefore res judicata. In encl 402 application vide the 228 Suit, the first and fourth defendants (qua the fourth and fifth defendants respectively in the 106 Suit) sought to remove the R&M. They also raised the issue as to the alleged lack of locus standi of the R&M. The defendants in the 228 Suit then appealed to this court against the dismissal of encl 402 but the appeal was struck out.

**[42]** Now, in another application filed vide the 106 Suit by the plaintiff herein to commit the third and fourth defendants for contempt of court on the ground of a breach of the court's order dated 14 December 2011, that is the Has Zanah's order, issued against them compelling them to do certain acts, a preliminary issue was raised by the defendants concerning a jurisdictional objection to the commencement of the application in the name of the trust. It was contended on behalf of the defendants that the plaintiff as a trust was not a body or individual recognized under the law as having the legal standing to sue or be sued. On 22 April 2013, Gunalan J in his decision dealt with the issue as follows:

> [10] Even though the present action/application is commenced in the name of the Trust, it was brought through the R&M who was empowered by the appointment order to institute any legal proceedings on behalf of the Trust. This was, in my view, in compliance with the terms of the above orders read together. As such, the question of the locus standi of P to commence the present application does not arise. The submission that the proper plaintiff should be the R&M and not the trustee had no merits in view of the explicit terms of the appointment order. The same goes for the submission that the R&M should have obtained leave of the court before commencing this action and that it should have been commenced in the name of the beneficiaries of the trust. Hence, the jurisdictional objection raised by the defendants had no basis and had to be rejected. For the record, a previous application by the defendants to remove the same R&M as a plaintiff was dismissed by this court on the ground that the R&M was not a litigant in his own cause as he did not bring the action in his own capacity but as R&M on behalf of the trust.

The defendants filed an appeal to this court against the above decision. However, the appeal was dismissed by this court on 10 March 2014.

**[43]** It is important to state that the above contempt proceeding against the third and fourth defendants was preceded by an Anton Piller and Mareva injunction relief sought by the plaintiff in the 106 Suit. The injunctions were obtained on an ex parte basis on 23 September 2011 and confirmed on an inter partes basis after hearing full arguments on 14 December 2011. The application for the said Anton Piller and Mareva injunction were applied for because the defendants failed to comply with the Vernon Ong's order with regard to handing over of the trust documents. During the inter partes hearing, the third defendant affirmed an affidavit on 30 September 2011 raising the issue of locus standi of the R&M in para 4 thereof. The issue was also raised in

A their submission dated 14 November 2011 and responded by the plaintiff in its written submission dated 16 November 2011. Has Zanah J (as she then was) dismissed the issue and confirmed the injunction order on an inter partes basis on 14 December 2011 (Has Zanah's order). The third defendant, during cross-examination in the consolidated trial of the 228 Suit and the 106 Suit, B had also confirmed that the locus point was raised in the High Court before Has Zanah J and this was rejected.

**[44]** The defendants appealed to the Court of Appeal against both the granting of the above inter partes injunction order and the dismissal of their C application to set aside the said injunction order. Both the defendants' appeals were dismissed by this court on 19 June 2012.

**[45]** The defendants had raised as part of their challenge in both the 228 Suit D and the 106 Suit and in the Court of Appeal, and now in these appeals that the R&M had no locus or capacity to file the 106 Suit. We would significantly emphasise, though, that this point found no favour both in the High Court and in this court. This point having been dismissed by the Court of Appeal bound the learned trial judge in the 106 Suit. Thus, for the purpose of these E appeals, res judicata applies. In any event, we hold that the R&M is empowered by the Vernon Ong's order to institute any legal proceedings including the action herein for and on behalf of the trust. The R&M is not a litigant in his own cause because he does not bring the action in his own capacity but as R&M on behalf of the trust.

F

**[46]** The issue of the R&M's locus could have been put to rest at this stage if not for the defence submission that Hue Siew Kheng J in Kuala Lumpur High Court Civil Suit No 24NCVC-2983–11 of 2012 had held in her written grounds that the R&M had no locus standi as the trust was not a legal entity. G The decision was delivered on 3 December 2015 when the consolidated trial of both the 228 Suit and the 106 Suit was in progress. The position adopted by the defendants is that the above decision estops the plaintiff by the rule of res judicata from maintaining the 106 Suit. The plaintiff in the 106 Suit was the applicant in the 2983 Suit. The applicant filed an application for committal H against one Haresh Mahadevan and the fourth plaintiff, Jasni bin Amat who represented all the other 162 plaintiffs, for interfering in the administration of justice and abuse of process. The ruling of the learned judge, learned counsel submitted, was a final ruling of the court since the R&M withdrew his appeal and that ruling therefore was applicable to the 106 Suit under the law of res I judicata.

**[47]** To appreciate the rival contentions on the applicability of res judicata to this action, it is necessary to state briefly the factual background of the 2983 Suit. The said 2983 was filed by some 163 plaintiffs seeking relief

affecting the 27 units. They were represented by one Haresh Mahadevan. The fourth defendant in the action herein was the sole named defendant in the 2983 Suit. It is significant to mention that when the 2983 Suit was commenced at the Kuala Lumpur High Court, the consolidated trial of both the 228 Suit and the 106 Suit had been going on in the Johor Bahru High Court. Without informing the court appointed R&M who was tasked with care and custody of the trust's assets by the Vernon Ong's order (which included the 27 units), and whilst the order of the R&M's appointment was still in place and without the R&M's knowledge, the fourth defendant in contempt of court interfered in the R&M's duties and in the due administration of justice, breached the injunctive 228 Suit order against him by surreptitiously agreeing on 10 December 2012 to a consent judgment in the 2983 Suit whereby he gave away interest to the 27 units to the so-called unknown 424 *orang asli* beneficiaries whilst he was bound and restrained against dealing with the same in any manner whatsoever. Indeed, so willing and eager was the fourth defendant to settle the case, he, as the sole defendant readily consented to the said consent judgment being recorded with no order as to costs. The fourth defendant, moreover, failed to disclose to the learned judge in the 2983 Suit namely, VT Singham J, of the 228 Suit injunctions against him and of the appointment of the R&M who had the custody of the 27 units.

**[48]** The R&M had to file a separate action vide JBHC Suit No 22NCC-101–04 of 2013 ('the 101 Suit') to nullify the said unlawful 2983 Suit order to protect the assets of the trust for its rightful beneficiaries and obtained the order on 1 August 2013. This was of course vigorously challenged by the fourth defendant and the plaintiffs in the 2983 Suit which challenges however failed. Subsequently, in the events that happened, the R&M commenced contempt proceedings against one Haresh Mahadevan who practised as an advocate and solicitors in the firm of Messrs Haresh Mahadevan & Co and the fourth plaintiff, Jasni bin Amat who represented all the 162 plaintiffs, for interfering in the administration of justice and abuse of process. Hue Siew Kheng J was satisfied that there was cogent and compelling evidence of the contemnors' acts of interfering with the administration of justice and abuse of process. However in view of her ruling that the trust was not a legal entity the application was dismissed with liberty to apply for leave to the R&M if he so wished.

**[49]** An appeal was filed by the contemnors and the R&M filed a cross-appeal against Hue Siew Kheng J's decision. But in the Court of Appeal, Haresh Mahadevan paid RM25,000 to purge the contempt and upon that payment, the R&M withdrew his cross-appeal. The issue of locus standi was thus not decided by this court. The decision of Hue Siew Kheng J on this point is not conclusive. Accordingly, when the defence contended that the decision of Hue Siew Kheng J is conclusive, we need only say that this is far from the truth.

A It is to be noted that the decision of Hue Siew Kheng J was made on 3 December 2015 whereas the decisions of Kamardin J, Gunalan J, Has Zanah J and the Court of Appeal on this issue of R&M's locus standi were decided well before her decision. It is quite apparent that Her Ladyship did not consider the terms of the Vernon Ong's order on the appointment of the R&M
B and the previous decisions on similar issue. In our judgment, her decision on the issue of locus standi of the R&M was made per incuriam. The earlier decisions are correct and the issue raised by the appellants had already been determined. The learned judge in the instant action correctly found that the defendants had already raised the issue of the R&M's locus standi to bring the
C 106 Suit to the High Court, but the issue failed to convince both the High Court and this court, as such it was dismissed. In the result, the defendants are estopped from raising it again. Their persistence and insistence in raising this issue yet again is clearly an abuse of the court process. There has to be finality
D on this issue. After giving much consideration to the submissions of the respective party, we take the view that the issue of locus standi as raised by the defendants in these appeals is wholly without any basis and consequently we dismiss it.

E CRITICISM OF THE JUDGMENT

**[50]** Taking the second ground, the issue here is whether the judgment of the learned judge had striking semblance with the plaintiff's submission and therefore ought to be impugned. The point of relevance which may be distilled
F from learned counsel's submission on this issue is that while the substantial part of the judgment represents mainly the plaintiff's written submission, the learned judge did not give due consideration to the evidence and submissions of the defendants. To emphasise his point, learned counsel for the fifth defendant (the appellant in the 226 Appeal) produced 'Annexure A3' to show
G where the substantive judgment was derived. The parts of the judgment which are coloured pink denote or represent the own words of the learned judge. In simple terms, learned counsel seeks to impress upon us that the learned judge had added very few of his own words and had adopted or repeated almost the whole or greater part of the plaintiff's submissions in the judgment. On the
H contrary, it is submitted, the learned judge did not consider the defence submissions at all. A comparative chart is also produced to show six examples where the learned judge had failed to consider the appellant's submissions.

I **[51]** In view of the foregoing, it is submitted that the judgment of the High Court ought to be impeached because:

(a) it does not represent the judge's analysis of issue or the reasoning for his conclusion instead the judgment merely represents the plaintiff's counsel's reasoning and mind;

(b) it does not meet the judicial and functional requirement of public accountability and on the contrary it breaches the rules of natural justice;

(c) it cannot satisfy that justice has been done;

(d) if accepted, the judgment will undermine the support of the legitimacy of the justice system and raises consequently legitimate concern on the miscarriage of justice;

(e) the learned judge could not have applied his own reasoning process to the case;

(f) the judgment is itself cogent evidence displacing the presumption of judicial integrity which encompasses impartiality;

(g) the judgment is not transparent and persuasive and will risk undermining the confidence of the public in the administration of justice; and

(h) when the learned judge adopts verbatim of the written submissions of the plaintiff, His Lordship creates the appearance that he has relinquished his judicial authority to the plaintiff.

**[52]** It would be useful to remember that this point has also been raised by the appellants in the 219 Appeal, 220 Appeal and 221 Appeal in respect of which we have prepared a separate judgment. We have dealt with this issue precisely and comprehensively in the said judgement and held that the learned judge was not plainly wrong and thus the judgment is valid and ought to be preserved. Accordingly, we do not think we need to dwell on it once again here. To settle this issue, it would suffice for this court to now quote from our judgment the relevant excerpts which we adopt and apply to the appeals herein:

> WHETHER THE JUDGMENT OUGHT TO BE IMPUGNED
>
> [120] The appellants submitted extensively at the outset of this hearing that the judgment of the High Court ought to be impugned for the reason that the learned judge considered mainly the submissions of the plaintiffs and adopted extensively those submissions as his judgment, without giving due consideration to the evidence and submissions of the appellants. The appellants submitted 'Annexure A3' (in yellow) (note: p 1 of Annexure A3 was withdrawn in court by Mr TA Sivam, learned counsel for the appellants, on 11 July 2018) to show the various parts of the judgment where the learned judge had adopted almost wholly or a greater part of the submissions of the plaintiffs, and had only added very few of his own words which were highlighted to this court in pink. They further submitted a comparative chart to show four examples of where the learned judge had failed to consider the defendants' submissions.
>
> [121] The leading authority on this issue, and whether miscarriage of justice has been caused by extensive adoption of mainly one party's submissions can be found in the case of *Dato' See Teow Chuan & Ors v Ooi Woon Chee & Ors and other*

*applications* [2013] 4 MLJ 351; [2013] 4 CLJ 901 where the Federal Court, in a review application, when deciding the issue of alleged copying or 'plagiarism' by the court in its grounds of judgment, inter alia, stated the following:

At p 918:

> [24] The Columbia Court of Appeal in that case allowed the appeal and ordered a new trial. However, the dissenting view of K Smith JA is highly relevant for our consideration where in paras 29 and 30 he said:
>
> [29] The question, then, is whether a reasonable and informed person, considering all the circumstances, would apprehend that the trial judge failed to independently and impartially consider the evidence and the law and to arrive at his own conclusions on the issues.
>
> ...
>
> [30] I would add that there is nothing inherently wrong with adopting the submissions of a party in whole or in part as reasons for judgment so long as those submissions truly and accurately reflect the judge's own independent analysis and conclusions. Trial judges are busy, and there can be cases, of which Gaudet and Ni-met Resources Inc are examples, where a party's submissions so accurately reflect the trial judge's reasoning that nothing would be gained by postponing other pressing work in order to rewrite the reasoning and conclusions in the judge's own words. However, judges who are tempted to prepare reasons for judgment in this way should be acutely aware they may create a perception that they did not reach their decisions independently. Such a perception would tend to undermine public confidence in the impartiality and independence of the judiciary generally and would bring the administration of justice into disrepute: *R v S (RD)* at para 111.
>
> [25] *The approach taken by K Smith JA is that, it does not follow that where the trial judge was found to have adopted the submissions of a party, the judgment should automatically be set aside. We need to consider further, whether on its proper analysis the judgment truly and accurately reflects the judge's own independent analysis and conclusions*. (Emphasis added.)

At pp 921 and 922:

> [29] A similar issue was raised before our Court of Appeal in the case of *Celcom (Malaysia) Bhd v Mohd Shuaib Ishak* [2011] 3 MLJ 636; [2010] 7 CLJ 808. In that case, the issue of wholesale copying of counsel submissions was raised as a point of appeal. Abdull Hamid Embong JCA (as he then was) approached the issue in the following manner:
>
> > [4] Learned counsel for the appellant in the opening remarks of his submission criticised the judge for almost totally adopting the submission of the respondent as his grounds of judgment. A comparative table of the judgment matching with the parallel passages in the respondent's submission was presented to us to press home the point that the learned judge had completely ignored the submission of the appellant. While we do not approve of the method adopted by the learned judge in producing his judgment, we say that this itself cannot be basis to strike down that

judgment, although it was strongly urged by the appellant, that judgment was flawed in not considering the counter arguments of the appellant. These flaws were presented to us as the grounds of this appeal which we now consider.

[30] *The Court of Appeal expressed its disapproval of the method adopted by the trial judge in substantially copying the submissions of counsel but held that that in itself cannot form the basis to strike down the judgment. The court then went on to allow the appeal on substantive merit.* (Emphasis added.)

[122] Coming back to the present case, we have deliberately decided to address this issue of copying the plaintiffs' submissions towards the later part of this judgment, and not at the beginning for the reason that as we go along in the consideration of the judgment with a fine toothed comb on all the issues, we are of the considered opinion that while it is true that the learned judge had adopted chunks of the plaintiffs' submissions in the court below, he did consider all the oral and documentary evidence adduced before him thoroughly and he did consider both the case of the plaintiffs and the case of the defendants in totality, and in great detail.

[123] We observe that the submissions of both parties are in English, whereas the learned judge had written the judgment in the Malay language. Thus, it cannot be said that the learned judge did wholesale copying of the plaintiffs' submissions. In our view, he merely agreed with and therefore adopted more of the plaintiffs' submissions. We find that the learned judge, having the benefit of hearing all the witnesses and examining all the documents before him in the lengthy trial, which spanned over the period from 1 October 2012–23 May 2016, had fully appreciated the facts, the evidence and law. We are of the considered opinion that the learned judge had independently made his own analysis of the evidence, arrived at his own findings, and then made his decision and orders on each issue for trial based on the law. That learned judge was more convinced by the evidence adduced by the plaintiffs' witnesses, whom he found to be more credible. He found that the defendants' witnesses, in particular the first defendant, Hamzah and Dinesh, were untruthful and lacked credibility. He therefore held that the plaintiffs have proved their case. We agree with decided cases that it is not good practice for the learned Judge to copy and/or adopt more of one party's submissions, but that cannot be the basis to impugn and strike down the whole judgment. On the whole, from a careful perusal of the judgment, we are satisfied that the learned judge did apply his mind objectively to the case before him, and there was no lack of judicial appreciation, or any judicial misappreciation of the facts and the law. We find that the learned judge was not plainly wrong, and thus we hold that the judgment is valid and ought to be preserved.

**[53]** We wish to add that the learned judge had undertaken a meticulous and full appreciation of the entire evidence in coming to his decision. There was clearly no blind wholesale adoption of the plaintiff's submissions. The consolidated trial proceeded for 75 days with 72 witnesses over a period of five years involving voluminous documents. We agree with learned counsel for the plaintiff that one cannot expect the learned judge to remember all the evidence that was led and he is expected to be guided by counsel on the relevant evidence

and the issues that the learned judge has to address. In his entire judgment, the learned judge made his decision based on the evidence as he adequately found it and on the law as he fully apprehended it. He cannot be criticised for doing so. There is nothing wrong with the manner in which the learned judge came to his decision. The learned judge in fact was more convinced of the truth of the plaintiff's evidence adduced through the R&M whom he found to be a credible witness. On the other hand, the learned judge found the defence witnesses to be wanting in credibility. On the submission that the learned judge did not consider the defence submissions, it would suffice for us to state that this is pure conjecture on the part of the defence, it should not hazard a guess in this regard when there is no evidence to suggest that just because the learned judge agreed with the plaintiff he did not consider the defence submissions. There is indeed not a scintilla of truth in it. The learned judge had given clear and adequate reasons based on the totality of evidence. Taking this ground, it is our conclusion that the defence argument involves a clear fallacy and as such must be rejected.

THE TRUST MONEY OF RM22M

**[54]** By way of emphasis, we would reiterate that on 5 June 2000 the High Court, in the trust order, inter alia, directed that the sum of RM22m out of the compensation sum of RM38,554,111.92 be paid directly to the trust upon notification of its establishment. On or about 5 July 2000, the Johor State Government paid the sum of RM22m directly to the fifth defendant in accordance with the terms of the trust order. Based on the evidence with regard to the movement of the trust's RM22m, it is manifest that on 11 July 2000, the sum of RM22m was deposited into the trust MBB Account No 501–011–398–102. On 26 August 2000 the sum of RM22m was transferred from the trust MBB Account No 501–011–398–102 to a trust fixed deposit in Bank Pertanian Malaysia at 4.35%pa and remained in fixed deposit there until 16 September 2002. The interest earned thereon up to 26 August 2002 amounting to RM1,914,000 was credited to the trust Bank Account No 1–202–014–368–4 at Bank Pertanian Malaysia. On 16 September 2002, the sum of RM22,027,868.31 (which included the interest earned) was transferred from the trust fixed deposit in Bank Pertanian Malaysia to the fourth defendant's personal account at Citibank Bhd Account No 0–8736662–018. Subsequently on 9 October 2002 the sum of RM22m (without any interest) was transferred from the fourth defendant's personal account at Citibank Bhd Account No 0–8736662–018 to Adong and Rahman's MBB Savings Account No 114–013–105–719. However, no information is available after the said transfer regarding the interest portion of RM27,868.31 which was transferred to Citibank Bhd on 16 September 2002. On the same day, the sum of RM22m (without any interest) was transferred from Adong and Rahman's MBB Savings Account No 114–013–105–719 to five separate fixed deposits in an MBB Account where it was deposited for one

year. The sum of RM22m (without any interest) was, on 9 October 2003 transferred from the five MBB deposits to the first defendant's and Adong's Alliance Bank Account No 14082–0–03–037555–1. The money remained in the said account for two years.

**[55]** The trust fund of RM22m (without interest) was eventually transferred from Alliance Bank Malaysia Bhd to ARB on 11 October 2005. A deed of trust was executed on 24 November 2005 between the former trustees named therein as settlors and ARB as the trustee. The fifth defendant held themselves out as the solicitors for the settlors and the third defendant was a partner in the fifth defendant. The settlors were also described as the beneficiaries under the said trust deed. It ought to be emphasised that from the date of the payment of RM22m in 2000 until the money was deposited with ARB in 2005, there has been no account submitted by the fourth defendant as the trustee to the trust as to what happened to the RM22m and the interest earned thereon. We must mention that the deed of trust in this regard requires the trustees to maintain proper accounts. One thing is therefore clear, that is that the failure on the part of the trustees to maintain proper accounts constitutes a breach of the trust deed.

STATUS OF THE TITLE AND OWNERSHIP OF THE 27 UNITS AND OTHER RELATED MATTERS

**[56]** The order and judgment of the learned judge dated 22 December 2016 declares in para 1 that the plaintiff is the owner of the 27 units and ancillary orders were also made for the hand over process of the said 27 units. The defendants in this regard concede that the 27 units rightfully belong to the plaintiff and that this court can make a consequential order that the 27 units can be registered in the name of the trustee in the 228 Suit. We would additionally mention that the appellant's defence has also agreed and conceded that the 27 units belong to the trust. Based on the scrutiny of the record of appeal, it is apparent that it has in fact been the position of the parties in para 3 of the statement of agreed facts dated 10 Augsut 2012 that on 21 January 2008 a resolution was passed by the former trustees to:

(a) appoint the first defendant to identify and propose to the trust properties for real estate investment purposes;

(b) authorise the first defendant to negotiate on behalf of the trust to acquire identified properties; and

(c) authorise the fourth defendant as trustee of the trust to be empowered to purchase the properties in his name and hold the same in trust on behalf of the trust and make a statutory declaration to that effect.

**[57]** Another undisputed facts which can be gleaned from the statement of agreed facts are these:

(a) the fourth defendant tendered in his own name to purchase the 27 units from the vendor namely DOSB (receivers and managers appointed) at the tender price of RM6,280,800;

(b) on 25 January 2008 the fourth defendant paid the tender deposit of RM628,080 to the receivers and managers of DOSB by way of an MBB cheque No 696450;

(c) on 5 February 2008, SME Bank, DOSB's financiers and assignees of the 27 units agreed to accept the fourth defendants' tender of the tender price of RM6,280,800;

(d) DOSB accepted the fourth defendant's bid to purchase the 27 units at RM6,380,800 on 12 February 2008;

(e) only on 2 May 2008, more than three months after the tender deposit of RM628,080 was paid, the 27 SPAs were signed between DOSB and the fourth defendant;

(f) subsequently on 14 July 2008, a resolution by the former trustees was passed and forwarded to ARB instructing ARB to release RM7m from the trust fund to the account of Messrs Sharifah & Associates which ARB did release on 1 August 2008;

(g) on 4 August 2008, at the instruction of the fourth defendant, Messrs Sharifah & Associates through the sixth and seventh defendants released the sum of RM7m to the first defendant by way of a CIMB cheque No 650963 which was acknowledged by the third defendant; and

(h) out of the RM7m, the sum of RM5,752,720 was used to pay the balance of the tender prices for the purchase of the 27 units.

**[58]** In view of these irrefragable facts, the admission and concession by the defendants that the 27 units belong to the trust, we are of the opinion that it is no longer necessary to delve deeper into this issue of the ownership thereof. In fact the third defendant in his evidence clearly admitted this fact when he testified:

> 100% Ms Renu, the titles belong to the Trust.

Hence, the above facts are sufficient for this court to affirm the order of the learned judge dated 22 December 2016 in paras 1, 8, 11 and 12 affecting the ownership and title of the 27 units and ancillary orders relating thereto.

**[59]** However, we would venture to lay emphasis on the evidence that the 27 SPAs handed over by the fourth defendant to the R&M pursuant to the

Vernon Ong's order showed that the said 27 SPAs were in the personal name of the fourth defendant despite the fourth defendant claiming that the 27 units were purchased for the trust. In fact we do not find anything in the SPAs to indicate that the fourth defendant hold the 27 units in trust on behalf of the trust as required by the resolution of 21 January 2008. He did not furnish any further documents and the R&M had to carry out his investigation relating to the purchase of the 27 units. We note that the fourth defendant also claimed that he purchased the properties in question in his personal name because a trust could not hold property. Obviously, the fourth defendant did not seem to realise that under s 344(1) of the National Land Code by an instrument of dealing any alienated land can be transferred to or vested in or created in favour of a body described 'as trustee'. In addition, pursuant to s 344(3), any instrument declaring the trust to which the land is subject (in this case, the deed of trust dated 5 June 2000) may be deposited with the registrar and any instrument of dealing shall be fit for registration by reason only of the fact that it refers to the instrument so deposited.

**[60]** We would necessarily mention that the fourth defendant also did not affirm a statutory declaration as required by the resolution of 21 January 2008 to state that he purchased the 27 units as trustee for the trust and held the same in trust on behalf of the trust.

**[61]** The evidence of DOSB's solicitors (PW57), an independent witness in the transaction of the 27 units also reveals that the 27 deeds of assignment and the 27 SPAs in his possession made no reference to the trust. The only document which mentioned the word 'Trust' is the deed of assignment which was in the fourth defendant's possession. The said deed of assignment was never surrendered by the fourth defendant pursuant to the Vernon Ong's order. It only surfaced after the Has Zanah's order dated 14 February 2011. The deed of assignment in question would be inconsistent with the 27 SPAs as well as the 22 deeds of assignment in the possession of PW57. It transpired that resolutions dated 21 January 2008 and 14 July 2008 surfaced only towards the trial of the 106 Suit to show that it was purchased for the trust. It is also worthy of note that these documents could have been surrendered to the R&M pursuant to the Vernon Ong's order dated 11 September 2009 but they did not do so although this is an important documentary evidence that could bolster the defence case that the 27 units were purchased for the trust. It is also interesting to note that the resolution dated 14 July 2008 stated that the meeting started at 2pm and terminated at 11.30am the same time the meeting on 21 January 2008 for the first resolution was terminated. The said meeting on 21 January 2008 however started at 11am.

**[62]** Besides, when the 2983 Suit was filed in 2012 seeking relief affecting the 27 units, the consent judgment gave the so-called unknown 424 *orang asli*

beneficial ownership. The fourth defendant herein and the sole defendant in the 2983 Suit, should never have entered into the said consent judgment because in the 106 Suit he claimed and conceded that the 27 units belonged to the trust and not for himself. Instead, the trust or the R&M should have been made the party since the 27 units belong to it. In *Amat Loyut & Ors v Saling Lau Bee Chiang & Ors (No 3)* [2014] 1 LNS 249 (the 143 Suit), Abdul Rahman Sebli J found that it was legally impossible for the 424 alleged beneficiaries to be given beneficial ownership over the 27 units in the 2983 Suit. Mr Subramaniam a/l Paidathally who was a chartered accountant and not a lawyer, drafted and filed the 2983 Suit in Messrs Shahrizal & Nasir's name. During the hearing of the application by Messrs Shahrizal & Nasir to discharge themselves from acting as solicitors for the plaintiffs in the 143 Suit, Mr Subramaniam a/l Paidathally admitted that he did not know who these 424 alleged beneficiaries were. It is to be noted that both the 2983 Suit and the 143 Suit were filed simultaneously by the same plaintiffs when the trial of the consolidated 228 Suit and 106 Suit was in progress. One of the defendants in the 143 Suit was the R&M and the plaintiffs in the said suit sought an order to remove the R&M. The High Court struck out the suit pursuant to O 18 r 19 of the Rules of Court 2012 upon the applications made by the first, seventh, ninth, tenth, 14th and 17th defendants.

**[63]** All the above facts manifestly show that while the defence concede that the 27 units belong to the trust, the fourth defendant's conduct is directly opposite to and inconsistent with the defence concession. On the facts of the present case, the fourth defendant has clearly evinced by such conduct the real and true intention that is, the 27 units were purchased for himself. It is little wonder that the learned judge, against these background facts, concluded that the intention of the fourth defendant was for the 27 units to be purchased and registered in his name.

**[64]** Notwithstanding the above, we accept that the third and fourth defendants admitted in their evidence, statement of defence and submissions that the 27 units were in fact the trust properties and also that legal possession had been surrendered to the R&M on 24 April 2009. By their own admission and concession, these 27 units are a non-issue especially when they have now surrendered physical possession of the 27 units to the R&M in January 2017 after the judgment of this case. That being their position, the implication and effect that have arisen in consequence of this concession is that apart from the 27 units, all other benefits derived from these 27 units as found by the learned judge must also accrue to the trust.

THE SUMS OF RM628,080 AND RM619,200

**[65]** A point of relevance that has emerged from the purchase of the 27 units by using the sum of RM7m withdrawn from the trust concerns the alleged advance by the fourth defendant in the sum of RM628,080 for the payment of the tender deposit for the purchase of the 27 units and the sum of RM619,200 retained by the first defendant for alleged renovations of the 27 units. The sum of RM619,200 is the balance left after the payment of the sum of RM628,080 to the fourth defendant and the payment of the remainder of the tender price in the sum of RM5,752,720 using the trust money of RM7m. We must highlight in this regard that the two sums were ordered by the learned judge to be paid to the trust as part of general damages.

**[66]** In para 3.3 of the statement of claim the plaintiff alleges that the fourth defendant paid the said tender deposit to the receivers and managers of DOSB drawn from an account of Bank Pertanian Malaysia. In para 3.20 of the statement of claim, it is pleaded that on 11 August 2008, the first defendant through the fifth defendant caused to be issued from the RM7m a payment amounting to RM628,080 in favour of the fourth defendant being the alleged repayment of the tender deposit paid on 25 January 2008. It is also pleaded in para 3.21 of the statement of claim that the remainder sum of RM619,200 from the RM7m was utilised to pay the first defendant to provide and undertake renovation works for the 27 units. In para 7 of the statement of claim, the plaintiff asserts that the first to the seventh defendants conspired to use the RM7m to purchase the 27 units. The position adopted by the defence as gleaned from the statement of defence is that the sum of RM628,080 was paid to the fourth defendant because he had paid his own money towards the payment of 10% of the purchase price of the 27 units whereas the sum of RM619,200 was utilised for the renovation of the 27 units. Clearly these two matters are sufficiently pleaded in the statement of claim.

**[67]** The defence presented two main contentions on the issue of the two sums. It is strenuously contended by the defendants that there is sufficient evidence to show that firstly, the tender deposit belongs to the fourth defendant and secondly, the sum of RM619,200 was expended for renovations of the 27 units. Now, as regards the first of this sum, that is the payment of RM628,080, it is not in dispute that this sum was paid to the fourth defendant by the utilisation of the RM7m. This is very clearly stated in the first defendant's letter dated 8 November 2010 to the plaintiff's solicitors when it explains that the payment was made by the first defendant's MBB cheque No 032826. The argument urged for the plaintiff is that the sum of RM628,080 came from Bank Pertanian Account No 1–202–014485–4 which

is the fourth defendant's personal account (his personal Bank Pertanian account). This account had received interest from the trust's RM22m making the sums in his personal Bank Pertanian account trust monies. This argument is supported by two letters written and signed by the former trustees and addressed to Bank Pertanian Malaysia. The first letter dated 17 December 2002 which was hand written, states as follows:

> The Branch Manager 17th December 2002
> BPM, KL Main Branch,
> K Lumpur
>
> Sir,
>
> *Re: Standing Instruction*
>
> You will be receiving a sum of about RM74,000/- every month on about the 11th day of each month with effect from 1.1.2003, into A/C No 1-202-014368-4 of the above sum, kindly deduct a sum of RM$46,800/- to be sent to the 52 accounts in Kota Tinggi.
>
> As for the remaining sum, please pay this sum into A/C No 1-202-014485-4. This standing instruction will be in force until further notice.
>
> Thank you.

This letter was signed by the fourth defendant, Adong and Abdul Rahman, the former trustees.

**[68]** We next consider the second letter. The said second letter dated 22 October 2003 was also written to Bank Pertanian by the trust and signed by the former trustees namely the fourth defendant, Adong, Abdul Rahman and Daud. It reads:

> Linggiu Valley Orang Asli (Jakuns) Trust
> c/o No 3, Jalan Abdullah,
> Off Jalan Bangsar
> Bangsar Utama,
> 59000 Kuala Lumpur
> Bil Tuan:
> Bil Kami: K10/CH814/94
> Tarikh: 22nd October, 2003
> The Branch Manager
> Kuala Lumpur Branch,
> Bank Pertanian Malaysia,
> Leboh Pasar Besar,
> Peti Surat 13013,
> 50726 Kuala Lumpur

Dear Sir,

RE: LINGGIU VALLEY ORANG ASLI (JAKUNS)

ACCOUNT NO: 1-202-014368-4

We refer to the above stated matter.

Kindly be advised that from the month of November, 2003 you will be receiving payments into this account from Alliance Bank Berhad, Ground Floor, Menara Multi-Purpose, Capital Square, No 8, Jalan Munshi Abdullah, 50100 Kuala Lumpur on the 9th of very month until further instructions.

Our instructions are as follows:

On receiving the payments from Alliance Bank on 9th day of each month or the next working day you are to retain this money until the 28th day of each month,

Then on 28th day of each month or the next working day you are to deduct a sum of RM46,800.00 and send them to the 52 accounts in Bank Pertanian Branch in Kota Tinggi as previously done and the remainder of the sum received from Alliance Bank (but not including the interest accrued for the month sums received) into personal accounts of S Kanawagi ie Account No 1-202-014485-4 as previously done.

**[69]** The fourth defendant confirmed that the sum of RM628,080 came from his personal Bank Pertanian account and there is no other personal account of the fourth defendant in Bank Pertanian Malaysia. Based on these two letters, it is clear to us that this account had received from the trust account No 1–202–014–368–4 interest generated from the trust's RM22m making the sum in his personal Bank Pertanian account the trust monies. It is important to remember that the interest earned on the RM22m up to 26 August 2002 amounting to RM1,914,000 was deposited in the trust account in question. The fourth defendant had testified and assured the court that he would produce his personal Bank Pertanian account statements to prove that the funds in that account were his personal funds. However he failed to do so, hence an adverse inference was rightly drawn by the learned judge against him. From his evidence during cross-examination, the fourth defendant admitted that he did not have his personal Bank Pertanian account statements in his possession. Hence, there is no evidence from the defence which is forthcoming to show that the tender deposit was paid using his own money from his personal Bank Pertanian account. The plaintiff has therefore proved their claim for this sum as part of the general damages by referring to the defendant's own documents to show that the Bank Pertanian accounts received and contained trust monies. The learned judge is thus correct in his decision that the plaintiff was entitled to this sum as general damages.

**[70]** Turning now to the renovation costs in the sum of RM619,200, we would observe that the plaintiff seeks to recover this sum from the defendants because, we were told, it was wrongly paid to the first defendant. The learned

judge in his grounds of judgment found that there was no evidence to show that this sum was utilised as renovation costs and the documents produced by the defendants were inconsistent. His Lordship similarly allowed this amount as general damages. Learned counsel for the first defendant in his oral and written submissions on this issue refers to the evidence of the R&M contending that the R&M had agreed to the fact that RM619,200 had been used towards renovations of the 27 units.

**[71]** The tenth report of the R&M (exh P17(A)) contains the review of the defendant's renovation costs breakdown. The details of the renovation costs breakdown together with a bundle of documents which were purported to support the renovation costs incurred are provided in the summary of accounts of RM7m from the trust. It has been urged upon us that we must consider the evidentiary documents such as invoices and contract documents supporting the renovation costs which were given by the defendants to the R&M on 12 October 2011. In fact the R&M in his tenth report also reports that the above summary of accounts of RM7m from the trust was handed over to his solicitors on the same date. Learned counsel further submitted that any reservations the R&M has, he could have easily investigated and the onus is on the plaintiff to call the contractors and suppliers to prove their allegation that the evidentiary documents provided by the first defendant were invalid and inaccurate.

**[72]** The evidence that we could discern from exh P17(A) is that the management agreement in cl 2.1.1 has specified a sum of RM810,000 for furnishing all the 27 units. However, the former trustees had written to the first defendant on 14 July 2008 stating that after deducting the purchase price for the 27 units, the balance available was RM619,200 for utilisation towards renovation purpose and as such the trust was not able to provide to the first defendant the sum of RM810,000 as stipulated in the management agreement. The first defendant subsequently on 17 July 2008 replied that they would endeavour to work with the reduced budget of RM619,200.

**[73]** Upon a review of the defendants' renovation costs breakdown the R&M was unable to accept the validity and accuracy of the defendants' renovation costs breakdown. The R&M found that from the summary of the ledger account of the first defendant it was evident that RM619,200 would not have all been utilised for renovation works since RM49,850 had not been utilised for renovation works instead this sum had been utilised for the payment of legal fees. The R&M also found the following:

(a) the documents provided added up to RM620,588.85 which exceeded the sum of RM619,200 by RM1,388.85;

(b) the documents amounting to RM56,013.10 and RM2,296.20 represented expenditure that had been capitalised in the financial statements of the first defendant during the period ended 30 June 2008;

(c) the documents amounting to RM4,079.20 and RM5,000 represented revenue expenditure during the period ended 30 June 2008; and

(d) the documents amounting to RM553,200.55 could not be matched with the first defendant's financial statement.

**[74]** The amount of RM553,200.35 includes the payment vouchers of RM440,000 allegedly made to Zack Anand (Simple Minds Resources) and Z&Z Bina Sdn Bhd. With regard to these payment vouchers, the R&M found that none of the payment vouchers stated whether the subject sum was paid in cash or by cheque, therefore they could not be traced to the actual expenditure of RM619,200. The payment vouchers for RM40,000 was dated 3 March 2008, well before the receipt of the sum of RM7m as such it could not be relevant. It is to be remembered that the sum of RM7m was released to the first defendant on 4 August 2008 whilst the former trustees wrote to the first defendant relating to the balance available for utilisation towards renovation of 27 units on 14 July 2008. This fact lends credence to the conclusion made by the R&M that these payment vouchers are not relevant. The R&M also found that there were no official receipts from Zack Anand (Simple Mind Resoucers) and Z&Z Bina Sdn Bhd provided by the first defendant to prove that payments amounting to RM440,000 were indeed made by the first defendant and received by the parties concerned.

**[75]** The sum of RM619,200, in our judgment, is indeed a very convenient figure said to be for renovation as it is the exact balance of the trust monies after the payment of the purchase price of the 27 units and after paying the fourth defendant the sum of RM628,080. The so-called renovation sum crystallised during the course of the trial and retained by the first defendant for the purported renovation of the 27 units. It ought to be emphasised that the fourth defendant was the shareholder and director of the first defendant. He was also the trustee of the trust at the material time. The RM7m was released to the first defendant in view of the relationship with the fourth defendant and the trust, the fourth defendant being one of the trustees. The first defendant therefore held the monies under a constructive trust as a constructive trustee. It is important to remember that Vernon Ong J in the 228 Suit (*Saling Lau Bee Chiang & Ors v Kanawagi Seperumaniam & Ors* [2010] 8 CLJ 347) also held that the sum of RM16,554,111.92 was held under a constructive trust and the defendants as trustees were acting in a fiduciary capacity. Likewise, both the first and the fourth defendant, where it concerns the sum of RM7m, could also be said to owe a fiduciary duty to the trust.

**[76]** The first defendant, as a constructive trustee and the fourth defendant being the trustee to the trust as well as the shareholder qua the director of the first defendant had to account for the expenses especially when the money was held by them before any expense was incurred. There was no explanation nor proof that could convince the learned trial judge that this sum was expended for the renovation of the 27 units. They had handed the documents aforementioned to the R&M, however both the fourth and third defendants could not explain and offer answers in rebuttals in respect of these costs nor produced the alleged documents in support. In fact the evidence of the third defendant as to the expenses is inconsistent with the entries in the ledger of the first defendant and it can be seen that part of these expenses was used to pay for legal fees not renovation. The third defendant was supposed to produce the auditor, TCMK Associated as their witness to explain the ledger but failed to do so. The testimony of the R&M on the other hand is crystal clear as to the fact that whilst he received these documents alleged to support the renovation costs, he was unable to come to that conclusion as the documents did not support that. The first defendant's Ledger and bank statements as stated above did not support and in fact contradicted the defendants' claim that the RM619,200 was used for renovation costs. As a fiduciary in possession of the trust money, the first defendant had to precisely and accurately account for the use of the money allegedly spent for renovations and not put the burden on the R&M to undertake this. But they failed to do so, instead they produced the documents without any explanation as to the purpose it was incurred and it did not tally with the amount spent.

**[77]** The learned judge referred to the case of *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 in which it was held:

> ... However the account books themselves were never produced and the defendants never dispensed with formal proof of the loss of profits alleged or at all. I in my opinion, the result of this glaring omission was to render such oral evidence of Mr So and P76 inadmissible in evidence ... and it makes not the slightest difference that Mr and Mrs Segat confirmed the accuracy of P76.

**[78]** The learned judge had the advantage of listening to the testimony of the third and fourth defendants in particular their evidence during cross-examination. He had in fact made full appreciation of their evidence and found that even though the defendants' documentary evidence were marked as exhibits, such documents on the basis of *Popular Industries Ltd*, could still be rejected where the witnesses in particular the third and fourth defendants could not explain adequately. These documents could not support and prove the defence position that the sum of RM619,200 was used to renovate

the 27 units. The learned judge found that the first respondent's ledger showed that the sum of RM619,200 was not utilised for the purpose the defence had alleged. The learned judge therefore rejected the defence evidence relating to the sum of RM619,200. His Lordship had made a finding of credibility against the defence witnesses and we do not find any cogent reason to interfere with such finding. We accordingly affirm His Lordship's decision on the issue of the sum of RM619,200 in that the same should be paid to the plaintiff as part of general damages.

THE MANAGEMENT AGREEMENT

**[79]** The next point raises question which concerns the validity of the management agreement. It would be useful to remember that the management agreement was entered into on 3 May 2008 between the first defendant and the fourth defendant. It is in evidence that the management agreement was prepared by the third defendant and the fourth defendant. They are father and son, partners of the fifth defendant and are directors of the first defendant at the material time. The third defendant was also the shareholder of the first defendant. The fourth defendant was one of the trustees of the trust. Given the nature of their relationship, it will be inevitable for us to conclude and find in this case that the parties knew that the 27 units were trust properties and hence they had a duty of care and owed a fiduciary duty to account to the trust for all monies received under the management agreement.

**[80]** It is the plaintiff's pleaded position that the management agreement was unlawfully entered between the first and fourth defendants. The plaintiff has also pleaded that the management agreement has negative one sided and self dealing terms as well as damaging effect on the trust, it is not a leaseback by the fourth defendant to the first defendant as claimed and has unlawfully outlived the trust which would expire in 2025. The management agreement moreover, also contains a term that if it is terminated earlier the trust would have to pay damages to the first defendant in the sum of RM1m which means the fourth defendant could not terminate it lest he would have to pay RM1m to the first defendant.

**[81]** It is apposite to state the points of importance that have emerged from the management agreement at this juncture. In cl 1.1 thereof the fourth defendant agrees to leaseback the 11 units to the first defendant. Such leaseback is stated to be for a term of 20 years but it should commence at the expiry of three months from 3 May 2008. The first defendant is entitled to let out or lease the 27 units at such terms and rent as it deems fit and appropriate. In addition, the first defendant is entitled to utilise the rent received from third

parties to pay for all costs and expenses specified in cl 5.1 of the management agreement and pay the balance the sum of RM26,587 per month or RM319,040 per annum for the leaseback. However, if the rent received by the first defendant is insufficient to settle the monies incurred or payable by the first defendant, the fourth defendant is required to pay the top-up sum.

**[82]** The trust is also obliged to give the first defendant the first option to purchase the 27 units at the fixed sum of RM7.5m at any time and the option clause shall survive the management agreement by five years. It ought to be emphasised that nowhere in the management agreement is it stated that the same was entered into between the first defendant and the trust. The fact that can be discerned from the evidence is that, at the time the management agreement was signed, the fourth defendant had not obtained an approval from the other trustees of the trust to enter into the same. During the trial, a document surfaced to show that the fourth defendant only sought the approval of the other two trustees on 14 July 2008 more than two months after the management agreement was signed. This is the finding of fact made by the learned judge in his judgment.

**[83]** On 2 May 2008, the 27 SPAs were signed by the fourth defendant as purchaser with the vendor that is DOSB. The fifth defendant in which the fourth defendant was the partner, acted for the fourth defendant, qua the purchaser. The management agreement was signed on 3 May 2008, one day after the 27 SPAs were signed. It transpired that on 14 August 2008, the Ministry of Defence ('MINDEF') had entered into a tenancy agreement with the first defendant for 11 out of the 27 units for a period of three years from 1 July 2008 and expiring on 1 July 2011. In accordance with the said tenancy agreement, the first defendant received RM34,650 per month for the 11 units. However, the first defendant pursuant to the management agreement pays the fourth defendant RM26,587 per month or RM319,040 per annum which constitutes the rent payable by the first defendant to the fourth defendant. Nevertheless, the first defendant shall be absolutely entitled to any balance received from the rent received which shall be deemed as the first defendant's income.

**[84]** Clearly, the monthly income derived by the first defendant from the said 11 units is more than sufficient to cover the monthly leaseback rent of RM26,578 hence generating a monthly surplus for the first defendant of RM8,063. Upon the expiry of the tenancy agreement on 30 June 2011, the same had been extended for a further three years from 1 July 2011–30 June 2014 at the same monthly rental. The first defendant, as aforementioned, also

agreed to leaseback the 27 units to the first defendant for a term of 20 years.

**[85]** The basis for the leaseback is explained in Recital E to the management agreement. It states that the first defendant negotiated with DOSB and managed to procure the purchase price of the 27 units at the price which was 40% below the market value thereby providing the fourth defendant, as the purchaser, with an instant profit on the fourth defendant's investment immediately upon execution of the 27 SPAs dated 2 May 2008. In consideration of the first defendant's services and consultancy, the fourth defendant agreed to leaseback the 27 units to the first defendant. With respect to Recital E, the learned judge found that no evidence was adduced by the defence to show that the 27 units were purchased at 40% below the market value.

**[86]** The learned judge considered the provisions in the management agreement which he found to be one sided and have self dealing terms. It is not disputed that the leaseback by the first defendant is for a period of 20 years commencing three months only upon the expiry of three months from the date of the management agreement which is 3 May 2008. This is very clearly provided in cl 5.4 of the management agreement. It follows that the management agreement only took effect on 3 August 2008 and would expire on 2 August 2028. It is quite clear to us that the management agreement has unlawfully and improperly outlived the trust which would expire in 2025. It is to be observed that the fourth defendant when cross-examined, claimed that it was a mistake. However, we find the so-called mistake is in favour and to the advantage of the first defendant since the rental proceeds earned, by virtue of this stipulation, were improperly retained by the first defendant.

**[87]** By amplification, since the management agreement, by virtue of cl 5.4, only took effect on 3 August 2008 instead of 3 May 2008, the requirement for the first defendant to pay the leaseback rental of RM26,587 per month would only commence from 3 August 2008. The above term inequitably and improperly permitted the first defendant to retain the rental income of RM34,650 earned from the 11 Units to the detriment of the trust. The 11 units belong to the trust therefore the rental proceeds earned from the tenancy of these units rightly belong to the trust. However, the first defendant has kept it as a secret profit. The loss thus suffered by the trust must be paid to it. The fourth defendant in his evidence agreed and admitted that what the first defendant did in keeping this sum they collected on the 11 units was wrong. Under the circumstances, we agree with the learned judge in concluding that this sum had to be returned to the trust as part of general damages.

**[88]** It is also a pertinent point to mention that the evidence gleaned from exh P17(A) also reveals that three other trust units out of the 27 units were let by the first defendant to Scope International (M) Sdn Bhd in May 2008 at a rental of RM10,800 per month (RM3,600 per unit). Pursuant to cl 1.1 the period of the tenancy commenced on 17 May 2008. It is clearly evident that the first defendant began to derive income from the three trust units from 17 May 2008. However, the management agreement only took effect on 3 August 2008. Therefore, the terms of the management agreement have also inequitably and improperly permitted the first defendant to retain the income of RM10,800 per month earned from the three trust units let to Scope International (M) Sdn Bhd. Such income retained by the first defendant for the period between 17 May 2008 which is estimated at RM27,000 is secret profit. The fourth defendant testified that the retention of the sum or RM27,000 by the first defendant earned on trust units was wrong. We agree with the learned judge that cll 1.1 and 5.4 which deal with the period of the leaseback and commencement of the payment of leaseback rent had unjustly enriched the first defendant to the detriment of the trust. The learned judge therefore is perfectly entitled to order for the sum of RM27,000 to be returned to the trust as part of general damages.

**[89]** Clause 2.1.1(a) of the management agreement mandatorily requires the trust, within seven days of delivery of vacant possession of the 27 units given by DOSB to the fourth defendant, to pay the sum of RM810,000 to the first defendant for furnishing all the 27 units. We agree with the learned judge that this clause is in favour of the first defendant since it does not allow the trust to question whether renovation works had been carried out or not and whether the money had been expended for the purpose stated in the said clause. We have already dealt with the issue of the renovation cost earlier and are in full agreement with the learned judge that there is no evidence to show that the reduced sum of RM619,200 had been expended for the renovation of 27 units. Learned counsel's argument that the sum of RM810,000 had been reduced to RM619,200 and spent on renovation therefore could hold no water.

**[90]** The learned judge also considered and construed other terms of the management agreement and similarly found them to be in favour of the first defendant as they do not bear any risk but instead these terms are not in the best interest of the trust. Clause 5.1 in particular stipulates that the first defendant is entitled to utilise the rent received as a result of leases or tenancies to pay for all expenses and costs. The balance of the rent received will be distributed in accordance with cl 5.2. To reiterate further, the trust is paid RM26,587 per month under cl 5.2.1 and pursuant to cl 5.2.2, the first defendant is entitled to any balance from the rent received. However, based on cl 5.3, the decision of

the first defendant in respect of the sum of the leaseback rent shall be final and conclusive. This is an unfair term as the decision of the first defendant is final and conclusive. This clause without any doubt leaves no room for the trust to exercise its legal right to dispute or challenge the decision of the first defendant in respect of the leaseback rent. On the other hand, the first defendant entered into the management agreement without exposure to any risk at all.

**[91]** Clause 5.5 additionally is in favour of the first defendant since in the event that the rent received by the first defendant is insufficient to settle the monies incurred or payable by the first defendant, not only that the trust would not receive its monthly sum of RM26,587, it would also have to pay the top up sum to the first defendant. Moreover, a perusal of cl 5.6.1 which does not impose any liability on the first defendant in the event of any default by its lessee shows that the first defendant is clearly protected from any risk despite being appointed as the management company to manage the property. Such provision surely is not in the best interest of the trust. The truth is, by virtue of this clause and cl 5.6.2, the first defendant is entitled to utilise all rents received by it as a result of the tenancies of the 27 units to make payments and insure the 27 units.

**[92]** Next, we turn to consider cl 6.2. It prohibits the trust from transferring, assigning or otherwise deal with the 27 units without the prior written consent of the first defendant. We agree with the learned judge that this clause is not in the best interest of the trust as it restrains the trust from dealing with the 27 units unless the first defendant gives its consent in writing. However, even if written consent is given, cl 6.3 gives the first defendant the first option to purchase the 27 units at the fixed sum of RM7.5m at anytime and the option clause shall survive the management agreement by five years until 2 May 2033. This is indeed a mandatory requirement leaving the trust with completely no choice. This term is detrimental to the trust because throughout the period of 20 years, the first defendant could buy the 27 units at the fixed price of RM7.5m even if the value of the 27 units has enhanced higher than RM7.5m. That right, we find, does not terminate upon the expiry of the management agreement. In fact, it survives for another five years after the expiry of the management agreement until 2 May 2033. Consequently, this provision is effective and enforceable notwithstanding the expiry of the management agreement. The trust would have to continue with such unfair and burdensome obligation for 25 years and would thus be deprived of any opportunity to sell the 27 units which rightly belong to it at a higher price or based on the correct value at the time of the sale.

**[93]** The defence however submitted that if the price goes down there is no

benefit to the first defendant and instead the trust benefits. The fourth defendant in his evidence testified that cl 6.3 is fair as the first defendant has to buy if the price goes up and down. However, what the defence fails to realise is that the first defendant will have the option to buy at the fixed price of RM7.5m and if the price goes down, by the clear term of cl 6.3, there is no obligation for the first defendant to buy at the said fixed price. The fourth defendant in his cross-examination, we observe, agreed to the above effect of this clause.

**[94]** The fourth and third defendants claim that the 27 units were purchased at the price 40% below the market value and the value now is higher, yet the first defendant as its management company and the fourth defendant as the director qua the trustee of the trust, whose fiduciary duty is to protect the trust, had fixed the price for the first defendant to purchase slightly over RM1m above the purchase price paid by the trust for the 27 units. It must not be forgotten that the second and the third defendants were the directors and shareholders of the first defendant at the material time. The fourth defendant was one of the trustees of the trust and he was expected to protect the interest of the trust, but even so he agreed on this term without the approval of all the trustees when the management agreement was signed. His position as the director of the first company was therefore in direct conflict with that of his position as the trustee of the trust. What the first, second, third and fourth defendants had done was undoubtedly in complete and blatant disregard of the interest of the trust.

**[95]** The fourth defendant was in fact taken through the terms of the management agreement including cl 7.1 which provides that after the period of 60 months the trust shall at its own cost and expense redecorate and refurnish the 27 units at RM40,000 for each unit. This clause is clearly a one-sided term because it unfairly allows the trust to bear the costs of renovation. Again the learned judge held that this is not leaseback or in the best interest of the trust. The fourth defendant, when suggested that if the trust was required to bear the cost of renovation every 60 months, the trust could have generated a better return if it placed the RM7m in a fixed deposit as it could have avoided having to spend money on the 27 units in the above stated manner, was evasive in his reply.

**[96]** To illustrate further on the same point of unfair contract terms, we refer to cl 8.1.1 which stipulates that the trust shall compensate the first defendant RM1m in the event of a breach by the trust. The effect of cl 8.1.1 is that the trust could not exit the management agreement for 20 years unless it paid the first defendant RM1m as damages. It is significant to note that the management agreement does not have corresponding clauses for the first defendant's breaches.

**[97]** The fourth defendant in his evidence admitted that he, as one of the trustees of the trust had entered into the management agreement with the first defendant of which his son, the third defendant owned the company and with full knowledge that the terms thereof were totally one sided and in favour of the first defendant. He also conceded that the plaintiff should be entitled to the relief sought that the management agreement should be set aside and that the same was commercially unfair to the trust.

**[98]** It is also important to note that nowhere in the management agreement does it expressly declare whether the same was entered into with the trust or the fourth defendant had entered into the said management agreement for and on behalf of the trust. On the contrary, the management agreement was entered between the first defendant through the involvement of the second defendant, the third defendant and the fourth defendant for their own ultimate benefit and to the detriment of the trust but strangely, when the 228 Suit and the 106 Suit were filed in 2009 and 2011 respectively they changed their stance and adopted the position that the fourth defendant acted as a trustee and was representing the interest of the trust. The fact remains that the fourth defendant was unequivocally and clearly described in the management agreement as the purchaser.

**[99]** Learned counsel submitted that the learned judge had erred in law, assessment of evidence and fact finding and the conclusions arrived at did not take into account evidence before the court. It is further submitted that the relationship between the trust and the first defendant is a contractual one, that it makes no business sense nor logic that the first defendant would manage the 27 units for free and that it was not entered unlawfully or to defraud.

**[100]** It may well be argued by the defence that the whole dealing relating to the management agreement is an arm's-length transaction and purely a contractual one. In our judgment, this is clearly not an arm's-length transaction considering the parties involved. It is in truth a related party transaction entered into with their own personal benefit and gain as its ultimate goal. On the face of it, the transaction only involved the first defendant and the fourth defendant. However, the fourth defendant is wearing two hats. In the first place he is the trustee of the trust, and in the second place he is also the director of the first defendant of which his son, the third defendant, is also the director and majority shareholder of the first defendant. When they signed the management agreement, they knew that the trust money was involved. So they owed fiduciary duty to the trust and was under the duty to act in the best interest of the trust and should not allow their interest to be in conflict with the interest of the trust. They therefore had to account to the trust and for the receipts of any money earned from the management agreement.

A **[101]** Looking at the management agreement as a whole and the manner in which it is entered into, the cumulative effect of this agreement plainly shows that it is not a fair commercial dealing when it undoubtedly involves unfair terms and contains the elements of fraud, self dealing and unjust enrichment. To enter into a contract in this manner with the terms which were against the B trust is unconscionable, and it is equally unconscionable where it involves a fiduciary of the trust whose interests, considering the terms of the management agreement highlighted above, are not adequately protected. Indeed, the terms of the management agreement are detrimental to the trust whose interests the fourth defendant, as the trustee and fiduciary, the first, second and third C defendants as constructive trustees and fiduciaries, are expected to protect.

**[102]** The first appellant might have paid the leaseback rentals to the trust, but the fact remains that there were monies which were retained by the first D defendant in the first three months of the management agreement and there are unfair terms therein drafted by the third and fourth defendants which are detrimental to the interests of the trust. We are mindful of the defence submission that the R&M should have conducted an independent review on the management agreement. We do not accept this submission. Such review is E unnecessary as the terms of the management agreement speak for themselves which show that it is clearly one-sided and contains self dealing terms. It is against this scenario that the learned judge granted the relief sought by the plaintiff so far as it concerns the management agreement and we think the learned judge is perfectly entitled and right to do so. The paramount F consideration is that the 27 units rightly belong to the trust and it is only fair and legitimate that the court ought to grant their wish for the management agreement to be declared null and void which they are perfectly entitled to obtain as there is ample evidence to justify the granting of such relief.

G **[103]** The learned judge declared the management agreement to be null and void and further allowed the plaintiff's application for ancillary relief for the purpose of the hand over exercise of the 27 units to the trust. The order takes effect from the date of the judgment and ancillary orders were made. It is to be borne in mind that the management agreement is not void ab initio. The H learned judge in his grounds of judgment at para (23)(i)(d) p 30 found that the management agreement was effective until the date of the decision. Again at p 75 in para (iv), the learned judge also found that the management agreement was effective from 3 August 2008 and still existed as at the date of his decision as between the first and fourth defendants. Therefore, it is effective until it is I declared null and void on 22 December 2016. As with any judgment of the court, the judgment in the instant case takes effect prospectively. Accordingly, the management agreement is void from the date of the judgment that is 22 December 2016. Thus, whatever benefits accrued pursuant to or derived from the management agreement cannot be kept by the defendants. Surely

there cannot be a situation where the management agreement is null and void yet the defendants keep all the monies earned and the benefits derived from such agreement with them.

**[104]** Our attention has been drawn to the argument of learned counsel for the first defendant that the management agreement came to an end by operation of law by virtue of the public prosecutor's seizure order dated 12 August 2012 (exh 249) made pursuant to s 51 of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the Act') seizing the 27 units ('AMLATFA order'). In our judgment, it matters not whether the management agreement is void in view of the decision of the learned judge on 22 December 2016 or consequently came to an end by virtue of the AMLATFA order. It would suffice for us to hold in this regard that the 27 units belong to the trust hence, whatever benefits accrued pursuant to or derived from the management agreement cannot be kept by the first defendant, it must instead be returned to the trust notwithstanding the status of the management agreement.

**[105]** In any event, we do not accept the view that the management agreement has come to an end following the issuance of the AMLATFA order. For detailed reasons which we will advert to in due course, suffice it to say at this point that the payments of rental by the tenants of the 27 units is not prohibited by the said AMLATFA order because in our judgment such payments and the management of these Trust properties do not constitute 'dealing' by virtue of the definition of the said term in s 3(1) of the Act and thus, not caught by the prohibition in s 54 of the Act and that s 54(3) thereof does not apply to this case.

CASE AGAINST THE SIXTH AND SEVENTH DEFENDANTS

**[106]** We have already dealt with the paper trail of RM7m from the trust. As it unfolded, we will need to look at the roles of the sixth and seventh defendants in the whole episode. Both of them are the appellants in the 227 Appeal. They are the partners of Messrs Sharifah & Associates at the material time. The position adopted for the sixth and seventh defendants was described by their counsel in this court to the effect that they were not liable since all that they did was merely to receive the RM7m from ARB on 1 August 2008 and release the same to the first defendant on 11 August 2008. Hence, they are not in any way negligent or liable in connection with the claim made by the plaintiff against them.

**[107]** The fact that the RM7m was taken from the trust is undisputed. The solicitors acting for the trust as stated in the 27 SPAs was the fifth defendant. However, by a letter dated 14 July 2008 written by the trust to Messrs Sharifah

& Associates, it was stated that the latter had been appointed by the trust as its solicitors for the purchase of the 27 units. The letter was signed by the former trustees who included the fourth defendant. This is consistent with the defence filed by the fifth defendant that Messrs Sharifah & Associates and the fifth defendant acted for the trust. On the same day, by another letter written to ARB by the trust and signed by the former trustees, ARB was instructed to remit to Messrs Sharifah & Associates the sum of RM7m to its CIMB account by 1 August 2008. Thus, as instructed, on 1 August 2008 ARB released the RM7m to Messrs Sharifah & Associates.

**[108]** It has become increasingly apparent from the evidence that there was no explanation by the defence as to why RM7m was withdrawn from the trust when the tender price of the 27 units was only RM6.38m and as to why Messrs Sharifah & Associates was appointed to receive the RM7m. We would say, though, notwithstanding the absence of any such explanation, the RM7m upon being subsequently released by ARB to and received by Messrs Sharifah & Associates, they had actually received the trust money from the trust, and therefore both the sixth and seventh defendants owed a fiduciary duty and the duty of care in dealing with the money.

**[109]** So far as the evidence shows, on 4 August 2008, after the sum was cleared in the firm's client's account, the RM7m was released to the first defendant. As the solicitors for the trust, Messrs Sharifah & Associates ought to have known that the first defendant had nothing to do with the 27 SPAs and there was no basis to release the money to the first defendant whilst the balance of the tender price was RM5,752,720, and not RM7m. That balance of the tender price was eventually released by the fifth defendant to DOSB's lawyers Messrs Aziz Zakaria Shaiful & Wan on 7 August 2008. It appears from this evidence and, as borne out by para 3.10 of the statement of defence, that the fifth defendant and Messrs Sharifah & Associates were joint solicitors representing the trust in respect of the 27 SPAs. The release of the sum of RM7m by Messrs Sharifah & Associates on 4 August 2008 to the first defendant was based on the instruction given by the trust by a letter signed by the fourth defendant only on the same date.

**[110]** Except for the fourth defendant, the other trustees did not sign the said letter. As such, the letter in question is not a proper trust authorisation to Messrs Sharifah & Associates. It is necessary to mention that this is one of the letters which was not given to the R&M pursuant to the Vernon Ong's order dated 11 September 2009 despite R&M's letter to the sixth and seventh defendants seeking documents of the trust. The responses of Messrs Sharifah & Associates are self-evident as to their breach and non-compliance with the said Vernon Ong's orders. It only surfaced at the committal proceedings against the

partners of Messrs Sharifah & Associates, namely the sixth and seventh defendants, and were never in the possession of the R&M.

**[111]** As events transpired, the cheque was collected by the third defendant and issued in favour of the first defendant. However, there was no covering letter issued by Messrs Sharifah & Associates accompanying the cheque that would explain the purpose for which the cheque was issued and secured an undertaking from the payee to expend the money for which it was released to the payee. It cannot be gainsaid that this payment was made without any adherence to the standard of conveyancing practice. They released the money blindly and recklessly which facilitated the first defendant to wrongly be in possession of the money and use the same which is the trust money. Herein lies the issue of the breach of the firm's fiduciary duty upon being entrusted with the trust money and, being as such, the money was held by the firm under a constructive trust. They could also be said to be holding the money as constructive trustees. When they received the money, they too owed the duty of care. They should not act in a negligent manner and in breach of their fiduciary duty they owed to the trust. The sixth and seventh defendants instead ought to ensure that the money was released to a right person. The first defendant was not part of the 27 SPAs. They thus had no right to receive and disburse the money. The firm of Messrs Sharifah & Associates obviously did not know of this important and relevant fact. The fourth defendant, who confirmed that the fifth defendant (including the third defendant as a partner of the fifth defendant at that time) and he himself were well-versed in undertaking conveyancing matters, testified that the practice was as follows:

(a) the purchase price would only be released at the completion of sale and purchase transaction;

(b) possession would only be given when monies changed hand;

(c) the solicitors for the purchaser should ensure that the balance purchase price is released to the vendor;

(d) the solicitors should secure undertakings before releasing the purchase price to the vendor that it be returned if the transaction could not be completed; and

(e) notice of sale must be given to developers namely the eighth defendant so that they could update their records.

The fourth defendant confirmed that all the above steps were not secured nor done in the case of the trust purchasing the 27 units.

**[112]** In their evidence, both the sixth and seventh defendants, as the partners of Messrs Sharifah & Associates admitted that they had departed from the standard conveyancing practice that must be adhered to, and did not take steps

A that must be undertaken when they released the payment of RM7m to the first defendant. The sixth defendant confirmed that the sale was not completed yet and did not have the 27 SPAs. They did not even know the terms of the 27 SPAs, the price of the 27 units, the balance purchase price and any information regarding the SPAs, yet they released the money so easily. The B letter dated 4 August 2008 states that 'the balance payment is due now' however the sixth and seventh defendants did not bother to find out what was the balance amount due. The said letter which instructed them to release the money in question to the first defendant stated that the amount to be remitted to the first defendant was for onward payment towards the balance purchase C price and any outstanding payments pertaining to the said sale and purchase. It is important to note that there is no evidence led to show that the firm indeed enquired whether there were any outstanding payments pertaining to the said sale and purchase of the 27 units.

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**[113]** It would have been different if the firm paid the balance purchase price to DOSB, the vendor, instead of the first defendant. Obviously, the sixth and seventh defendants, as the partners of the firm, had breached their fiduciary duty and duty of care as solicitors. They were negligent in their conduct and E undoubtedly had colluded with the fourth and first defendants to fraudulently withdraw and receive the trust money of RM7m from ARB and misuse it.

**[114]** There is a further distort to this payment of the RM7m. Apparently, on 3 August 2008, the first defendant passed a resolution to the effect that the trust F money of RM7m received by it was to be utilised for the benefit of the trust pursuant to the trust resolutions of 21 January 2008 and 14 July 2008. However, the resolution also resolved that the third defendant gave the first defendant an undertaking to repay the RM7m to the first defendant interest free, unsecured and without any fixed terms of repayment. The third G defendant, when cross-examined on the resolution, confirmed its contents. As regards his undertaking to repay the RM7m to the first defendant, the third defendant said that it had nothing to do with the trust money. He further testified that if he wanted to increase the share capital by 7 million he had to H undertake to pay the money. He disagreed to a suggestion that a company could only increase its share capital with actual cash or cash consideration. The third defendant also confirmed that on 3 August 2008, when the said resolution was passed, the RM7m had not been received by the first defendant yet. It was received on 4 August 2008. He also agreed that it was erroneous I when the resolution stated that the RM7m was received by the first defendant on 3 August 2008. The third defendant further said that there was no other RM7m on the date in question. The resolution, we apprehend, means that by the use of the word 'repay' and 'repayment' in the said resolution, the first defendant gave RM7m to the third defendant as a loan.

**[115]** On 3 August 2008 however, the first defendant was not in receipt of the money yet. Messrs Sharifah & Associates only remitted the said sum to the first defendant on 4 August 2008 upon receipt of the instruction by the trust on the same day. The resolution in para 1(c) further stated that RM619,200 was to be retained by the first defendant for the purpose of renovation of the 27 units 'as per the agreement dated 3.3.2008'. The agreement referred to is undoubtedly the management agreement, but there was no such agreement on 3 March 2008 since the management agreement was only signed on 3 May 2008. The RM7m that was loaned to the third defendant is the same RM7m used to pay for the purchase of the 27 units, to pay RM628,080 to the fourth defendant, and RM619,200 allegedly for the renovation of the 27 units and for the increase in authorised capital of the first defendant. We shall deal with the issue of the increase in the first defendant's authorised capital in due course. Both Messrs Sharifah & Associates through their sixth and seventh defendants and the fifth defendant, as joint solicitors in the trust, were the conduits to receive and release the RM7m without making sure the documents were in place and by not adhering to the standard conveyancing practice.

**[116]** The learned judge, in considering the issue of the sixth and seventh defendants' liability, found them to be evasive, untruthful and not credible witnesses. The seventh defendant is the wife of the sixth defendant and both are the partners of Messrs Sharifah & Associates. In her evidence, the seventh defendant testified that she did not know that the trust money of RM7m was paid into her firm and subsequently was released to the first defendant. She was not sure whether her husband, the six defendant was acting through the firm. The seventh defendant said that she did not know the firm's accounts were audited for the year 2008, but further in her evidence she said that she only knew later that the accounts had in fact been audited. She added that she could only be negligent if she had conduct of the matter on which she was being sued. However, the seventh defendant contradicted herself when she told the court during cross-examination that she became aware of the RM7m going into the firm at the time the accounts of the firm were being audited but, during re-examination, she claimed that she did not know of this even at the time the accounts were being audited.

**[117]** We will say it again at this point that the seventh defendant was also evasive and gave dishonest answers. For example she told the court that she did not know anything about the claim against her and did not know what her defence was. This is unbelievable given that she is a lawyer. The seventh defendant also testified that partners are not jointly but separately liable for claim against the firm. However, under the Partnership Act 1961 we can discern no difference nor separation between the partners and the firm. They are in fact jointly liable and, as a lawyer, she ought to know this. Minutes later, she claimed that her husband, the sixth defendant, was acting without her

knowledge. The learned judge cannot be faulted in finding that the seventh defendant was not a credible witness in the face of her manifestly selective evidence which is also replete with contradictions. Such evidence ought to be rejected.

**[118]** The sixth defendant is a conveyancing lawyer. He testified that it is not usual for two lawyers to act for a purchaser and that it only happened in this case. The sixth defendant further testified that the fifth defendant was the conveyancing lawyer for the transaction of the 27 units and his firm was appointed to only accept the RM7m and disburse the same. But we find this could not be true in view of the clear letter of 14 July 2008 which appointed the firm to be 'the Solicitors for the Linggiu Valley Orang Asli (Jakuns) Trust for the purchase of 27 Units ... and to do whatever necessary for the completion of this sale as well as all ancillary matters to complete this sale'. Furthermore, in his evidence he told the court that he must act in the client's interest. He also admitted that ARB released the money to his firm as they had been held out to be the trust's lawyers. The sixth defendant confirmed that the sum of RM7m was released to the first defendant without him even having a copy of the 27 SPAs. He could not answer and in fact did not know how much to release to the first defendant as each unit price was different, and merely said that his client instructed him to release the RM7m, which he did. The sixth defendant confirmed that he had a duty to complete the sale in accordance with the instruction stated in the letter dated 14 July 2008 but later contradicted himself when he testified that his duty was not to complete the sale but to release the RM7m only. The sixth defendant's testimony that the firm had a limited role however was not supported by any document. The sixth defendant we observed conceded this fact.

**[119]** The sixth defendant also confirmed that there was a breach of cl 2.1 of the 27 SPAs as the money was released to the first defendant, which was not provided in the said clause. The said clause requires the balance purchase price to be paid to the solicitors of DOSB. The sixth defendant also said that he did not know what was the purchase price for the 27 units and what the first defendant did with the money, and whether the obligations with DOSB had been carried out. The sixth defendant also admitted that he did not comply with the Vernon Ong's order when he agreed that he did not give all the trust documents to the R&M. By releasing the whole of RM7m to the first defendant without even knowing the actual and balance purchase price to our minds is clearly and wholly negligent. It is pertinent to remember that the first defendant was not the vendor and the first defendant did many unlawful things with the RM7m such as using the fund to increase its share capital, retaining RM619,200 towards the unproved renovations, and releasing RM628,080 to the fourth defendant purportedly as reimbursement.

**[120]** The sixth and seventh defendants claim that the relief granted by the learned judge pertaining to the titles and hand over of the additional 30 units to the trust ought not to have been ordered against them as it has no nexus to them. Our answer to this line of defence submission is that all the defendants are sued as joint tortfeasors, all of them filed a joint defence and therefore all of them can be found liable to the whole damage. In the case of the sixth and seventh defendants, we would say on this aspect that, if not for their negligence or had they discharged their duty as conveyancing lawyers in a proper, careful and diligent way, all these breaches and losses suffered by the trust could have been avoided at the point of time Messrs Sharifah & Associates received the instructions from the trust on 4 August 2008 to release the sum of RM7m to the first defendant. Their breach of duty of care and negligence had facilitated these wrongdoings leading consequently to the use of the trust rent and proceeds to purchase these additional 30 units. They cannot now come to court and say that they are not liable in the case of the purchase of the additional 30 units. Obviously, the sixth and seventh defendants' omission and act had caused the plaintiff injury which is indivisible, and which omission and act had been a proximate cause of the injury. Thus, since they are joint tortfeasors or even if they are independent tortfeasors not acting in concert, they are liable for the whole damage and must also compensate for the whole of it (*Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals* [2003] 1 MLJ 567).

**[121]** We are satisfied, in the event, that there are no cogent reasons for this court to disturb the assessment and finding made by the learned judge that the sixth and seventh defendants are not credible witnesses and that both of them are liable. We do not think that anything material turns upon learned counsel's argument on this issue.

CASE AGAINST THE FIRST, THIRD AND FIFTH DEFENDANTS

**[122]** The first, third and fifth defendants are the appellants in the 224 Appeal, the 228 Appeal and the 226 Appeal respectively. The fourth defendant played a multifaceted role in the entire case. He was one of the former trustees of the trust whilst being a partner with the third defendant in the fifth defendant. The fourth defendant was also a shareholder and director of the first defendant together with the third defendant. The fifth defendant was the solicitors on record for the 27 SPAs in respect of the 27 units. However, Messrs Sharifah & Associates was also appointed as the solicitors for the trust for the purchase of the 27 units and disbursement of the RM7m to the first defendant which had nothing to do with the 27 SPAs. As the solicitors, they had breached their duty of care, they were negligent and had breached their fiduciary duty when they allowed the misuse of the RM7m. This conduct was the subject matter of a disciplinary proceedings where the Disciplinary Board found both the third and fourth defendants to have been dishonest in dealing

with the RM7m and struck them off the Rolls. This decision was upheld by the High Court and this court. The Federal Court however, reduced the sentence imposed against the third defendant to a suspension of five years.

**[123]** With respect to the first defendant, the initial directors of the company were the fourth defendant and the third defendant. Subsequently, the fourth defendant's shares were transferred to the second defendant (the appellant in the 225 Appeal). As earlier mentioned, the solicitors for the trust were the fifth defendant, where the fourth defendant and the third defendant were partners, when the RM7m was paid to the first defendant. The second and third defendants were at the material time the shareholders and directors of the first defendant. It was due to the interrelationship and the capacity in which they acted that on 4 August 2008 the first defendant received the RM7m from the trust. They knew the money belonged to the trust. When the RM7m was transferred to the first defendant, the money was held under constructive trust. They therefore became constructive trustees of the money and the directors owed a fiduciary duty to the trust to account for this money and also a duty of care especially when they ought not to have been in possession of this money.

**[124]** In a scramble to cover their tracks, during the course of the proceedings, the first appellant produced its resolution dated 3 August 2008 stating that the RM7m received by the first appellant should be utilised for the benefit of the trust to purchase the 27 units and also a resolution that this RM7m was to be taken as a loan to the third defendant. These resolutions were plainly inconsistent with each other. We would significantly emphasise that the resolution stated that 'RM7,000,000 received by the Company from' the trust when in actual fact no such money was received on the date of the resolution. The first defendant in fact received the sum on 4 August 2008. The management agreement referred to was dated in 'May', and not in 'March' as stated in the resolution. The resolution was thus fraught with inconsistencies. The first defendant, as we have found earlier, had no right to be in possession of the trust money, to decide arbitrarily how and to whom it should be distributed when it was the duty of the former trustees to be responsible for it.

**[125]** Documents also surfaced at the trial showing that between 7 August 2008 and 11 August 2008, the first defendant paid the sum of RM628,080 to the fourth defendant as a purported refund of his advance, RM5,752,720 was remitted to the fifth defendant to be paid to DOSB and the balance was kept by the first defendant towards the unproved renovation of the 27 units. The first defendant should not have been given the discretion on how to utilise the trust money. In their letter to the solicitors of the plaintiff dated 8 November 2010, the first defendant gave the details of account regarding the utilisation of the RM7m as follows:

(a) preparation of MBB bank draft No 016499 amounting to RM5,752,720 to Messrs Aziz Zakaria Shaiful & Wan and forwarded the same to the fifth defendant;

(b) preparation of MBB bank cheque No 032826 amounting to RM628,080 to the fourth defendant and forwarded the same to the fifth defendant; and

(c) the withholding of the balance amount of RM619,200 for utilisation for renovation works.

Further documentary exhibits viz:

(i) the fifth defendant's letter of 2 July 2010 to the solicitors of the plaintiff confirms that the above MBB bank draft No 016499 was paid to DOSB's solicitors;

(ii) the above MBB bank draft was sent to the DOSB's solicitors vide the fifth defendant's letter of 7 August 2008; and

(iii) the trust's letter of 14 July 2008 informed the first defendant that the balance available was RM619,200 for utilisation towards renovation purpose.

Clearly, these defendants were acting in concert to cause injury to the trust whilst at the same time they were in breach of their fiduciary duties to the trust and a duty of care especially when they ought not to have in possession of the money. The whole episode in our judgment smacks strongly of conspiracy to injure, negligence and breach of duties.

INCREASE IN THE FIRST DEFENDANT'S SHARE CAPITAL

**[126]** We have stated elsewhere in our judgment that there was no other RM7m apart from the RM7m which was withdrawn from the trust fund. The third defendant's evidence confirms this fact. In the course of the trial, documents had surfaced in the form of a resolution of the first defendant dated 13 August 2008 for the increase in the paid-up capital of the first defendant from 30,002 to 7,030,002, by an increase of RM7m ordinary shares of RM1 each 'by way of cash' consideration to:

(a) the second defendant who was allotted 3,570,000 shares; and

(b) the third defendant who was allotted 3,430,000 shares.

**[127]** This resolution was signed by the second and third defendants. The said resolution is found in Appendix 30 to the R&M's tenth report (exh P17(D)). On the same date, a notice of resolution in Form 11 under the Companies Act 1965 was also issued and lodged with the Registrar of Companies to notify the latter that the share capital of the first defendant had been increased from

RM100,000.02 divided into 100,000 shares of RM1 each to RM10,000,000 divided into 10,000,000 ordinary shares of RM1 each. We would further add that the first defendant also issued on the same date Form 28 which was lodged with the Registrar of Companies notifying that the authorised capital of the former was increased from RM100,000 to RM10m. With this exercise, the authorised capital of the first defendant was RM10m divided into 10 million shares of RM1 each whilst the paid up capital was RM7m divided into 7 million shares of RM1 each.

**[128]** This resolution is inconsistent with the first defendant's earlier resolution dated 3 August 2008. In that resolution, the RM7m should be utilised for the benefit of the trust to purchase the 27 units and that the RM7m was a loan to the third defendant. Clearly, whilst the contents of the resolution dated 3 August 2008 were in itself already inconsistent with each other, further distort was also caused by the passing of the resolution of the first defendant dated 13 August 2008 mentioned above.

**[129]** The first defendant's record reveals that the RM7m belonging to the trust was utilised unlawfully by its directors namely the second and the third defendants to increase the paid up capital of the first defendant and was fraudulently shown in audited accounts to have been released as a loan to the third defendant. This exercise was in purported compliance with s 54 of the Companies Act 1965 which deals with return as to allotment of shares and to mislead the relevant authority that the paid up capital of the first defendant was RM7m paid in cash. The first defendant's own documents in the form of a bank statement did not show any cash capital injection save for the trust fund of RM7m and this was admitted by the third defendant. The second defendant on the other hand never appeared in court during the entire trial to give any evidence to the contrary.

**[130]** The resolution of 3 August 2008 stated that the third defendant gave the undertaking 'to repay the RM7m to the company'. The words 'to repay' and 'repayment' appearing in the said resolution indicate that the amount of RM7m was given as a loan to the third defendant. The audited account in the year 2009 also uses the word 'repayment'. We need only say on this aspect that if it is indeed true that the first defendant had given the alleged loan to the third defendant for the purpose of payment for the allotment of shares, such loan constitutes dealing by a company in its own shares and under s 67 of the Companies Act 1965, the first defendant is prohibited from giving a loan or financial assistance in connection with the purchase of its shares. The admission by the third defendant that the first defendant did not have the fund of RM7m implies that the first defendant, the second defendant and the company secretary made a false and fraudulent representation in Form 24 dated 13 August 2008 to the Registrar of Companies stating that 7 million

shares had been allotted to the second and third defendants for cash consideration. Such allotment is fraudulent in nature and is in breach of s 364(2) of the Companies Act 1965 which makes it an offence if a person makes in any return or document a false or misleading statement knowing it to be false or misleading. Based on the scrutiny of the evidence, we find that no such loan was given to the third defendant. The RM7m withdrawn from the trust was utilised to purchase the 27 units, to pay the fourth defendant and the balance was retained by the first defendant for the unproven renovation.

**[131]** The audited accounts of the first defendant for the years 2009–2011 were also fraudulent and inconsistent as it was reflected as a loan to directors when no such monies were lent. The audited account for the year 2009 in Note 8 states that the amount due from directors was RM6.7m and the amount is interest free, unsecured and has no fixed terms for repayment. However, the audited account for the year 2010 the amount due from directors was not reflected anywhere in the account. In the audited account for the Year 2011, Note 8 once again reported on the amount due but this time it was reported as 'Amount due from shareholder' which was RM6.4m. The auditor for the first defendant namely TCMK Associated reported on 14 December 2011 that the total issued capital of RM7,030,002, a sum of RM7m is deemed paid from monies remitted by a third party to the company, but it could not sight any resolution pertaining to this arrangement. In any event, TCMK Associated was not called to explain and clarify the filing of these false documents and therefore adverse inference can be drawn against the defence for this manifest failure.

**[132]** These inconsistent entries could not be explained by the third defendant who was cross-examined extensively on these three audited accounts. He testified that the auditor could explain it, but inspite of that and as found above, the defence never called TCMK Associated to testify. It is manifestly possible that the exercise of going through these resolutions was to portray the first defendant as the RM7m company as evident by the fact that the second defendant had written to the Minister, Deputy Minister and Secretary General of the Ministry of Federal Territories on 23 March 2009 misrepresenting the value of the first defendant to be RM7m company.

CASE AGAINST THE SECOND DEFENDANT

**[133]** We now turn to consider the case against the second defendant who is the appellant in the 225 Appeal. It is the defence position that the case against him was not proved, his role was only confined to securing the tenancy from MINDEF and that there was no necessity for him to come to the court to testify otherwise as the case against him has not been made out. It is certainly noteworthy that that there is no evidence led nor fact pleaded as to the alleged

limited role of the second defendant. Nevertheless, it is not true nor correct to say that his role was limited as documentary evidence proves otherwise. In fact he had taken full part in the activities of the first defendant, one such act being the illegal act of increasing and allotting shares to himself. The second defendant, as shown above, had signed all these documents relating to the increase in share capital which are fraudulent. He also signed the three audited accounts of the first defendant for the years 2009–2011 which contained false particulars. He went further to write to third parties including the Minister, Deputy Minister and Secretary of General of the Ministry of Federal Territories on 23 March 2009 on behalf of the first defendant misrepresenting the value of the first defendant to be a RM7m company seeking benefits for the first defendant in the deal to purchase the additional 30 units.

**[134]** The 106 Suit claim is not a case of lifting the corporate veil of the first defendant but one of a breach of fiduciary duty, breach of duty of care, negligence and conspiracy to injure. The moment the first defendant received the trust funds, the second defendant became a fiduciary to the trust. He is also liable jointly with the other defendants. There is no inter se defence between the defendants themselves but a joint defence thus making him a joint tortfeasor and liable as such. That is where his culpability comes in. The evidence led by the plaintiff as highlighted earlier as to his role rebuts the defence argument that the second defendant's role was confined solely to the securing of the tenancy with MINDEF. The learned judge had addressed all these issues, as well as all the relevant documents and came to the conclusion as he did. We have before us a decision based on the defence own documents to show what happened to the RM7m. The learned judge in our considered opinion could not have come to a different conclusion. The second defendant, along with the other defendants would be liable to account for the use of the RM7m fraudulently and in breach of their fiduciary duty and duty of care.

SECRET PROFITS

**[135]** The learned judge in his decision had ordered various sums to be paid as general damages against the first to the seventh defendants. These sums are:

(a) RM7,540,625;

(b) RM1,010,306 being arrears in rentals for the 27 units from May 2013–June 2016 and continuing at the rate of RM26,587 per month from July 2016 until the date the surrender of the title and/or vacant possession;

(c) RM628,080 and RM619,200;

(d) RM27,000 and RM34,650; and

(e) RM572,473.

We have already dealt with the award of damages in (c) and (d) above. We shall now proceed to consider the appeal relating to the awards of various sums in (a), (b) and (e) above.

**[136]** The learned judge came to a finding that there were secret profits made in respect of the sums in (a), (b), (d) and (e) and allowed these sums as damages. Learned counsel for the first defendant strenuously submitted that none of these claims are pleaded by the plaintiff and the learned judge had erred by going beyond the parameters of the pleadings. Learned counsel for the plaintiff conversely contended, and we agree, that the amounts awarded by the learned judge crystallised during the trial as part of general damages which is clearly pleaded in the statement of claim and it was quantified when the evidence was led in the course of the trial. It was not quantified in the pleadings because the amount was not known before the trial. We accept that when the 106 Suit was filed there was no information given by the defendants about the monies collected from the trust properties except from the reports prepared by the R&M based on his investigation. When the trial commenced and as it progressed, documents surfaced and through the evidence elicited during cross-examination of the defence witnesses, the claims in respect of these amounts crystallised based on the best evidence available.

**[137]** After giving much consideration to the pleadings of both the plaintiff and the defendants, we do not think that the gravamen of the defence complaint of inadequate and unpleaded case has any strong basis. The pleadings are clear and are based on the limited information that was available to the R&M at the material time. The defence knew the case that they had to meet and did file in exhaustive detail their statements of defence to the claim. Surely with the line of examination of the R&M and cross-examination of the defence witnesses adopted by the plaintiff's counsel, it would provide sufficient and clear notice to the defence as to the direction the plaintiff is going and the position it is adopting. Moreover, when the plaintiff led evidence on the issue of secret profits, the defence examined the R&M extensively on these amounts without raising any objection to the evidence in respect of the same being adduced. The defence witnesses in particular the third and fourth defendants had also testified and given evidence in rebuttal in respect of these sums. Clearly, the plaintiff led evidence on the subject to which the defence did not object. Far from being surprised, the defence had, by its conduct clearly entered upon the very issue. It is only in their submissions the defence took the plaintiff's case on this point.

**[138]** In *Arab-Malaysian Finance Bhd*, this court considered the unpleaded case point and found that the unpleaded matter was thoroughly investigated during the trial and that lengthy written argument filed by all sides addressed the issue sufficiently. The defendant in the above case took objection for the

first time to the change in track by the plaintiff. By then all the relevant evidence on the point had already been let in after intensive cross-examination by both sides of the relevant witnesses. It was held that far from being surprised the defendant had by its conduct clearly entered upon the very issue, both during the evidence and in argument. It therefore suffered no prejudice whatsoever.

**[139]** In this case, in our judgment, it is too late in the day to get anywhere with this submission when the defence failed to object to the evidence that was led on the issue of secret profits and on the contrary they decided to engage in this issue. Thus, the Supreme Court in *Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185 held that a party taken by surprise must object then and there at the point of time when evidence which departed from pleaded material facts for such evidence to be disregarded. Based on these authorities and the conduct of the defendants, we are satisfied that the learned judge had not gone on a frolic of his own as such we find no merit in defence complaint. Learned counsel for the plaintiff indeed advanced the most compelling argument against this ground and we are persuaded to hold that the defence certainly did not suffer from prejudice at all from the basis on which the learned judge approached the case and ultimately awarded these sums as general damages.

THE CLAIM FOR RM7,540,625

**[140]** The learned judge made the order for this sum to be paid as the defendant had received and utilised secret profits from the remaining 16 units belonging to the trust and such secret profits were not disclosed for which no information was shared. Appendix 11 to the R&M tenth report (exh P17) shows the total rental and expenditure report for the 27 units for the years 2008–2011. It clearly shows that the remaining 16 units were also rented out. Equally clear from this report is that the first defendant earned rental proceeds from the 11 units rented out to MINDEF and rental proceeds earned from renting out the remaining 16 units. These incomes earned from the tenancy of the 16 units were secret profits which ought to be paid to the trust.

**[141]** Learned counsel for the plaintiff submitted that the sum was derived from the rental of the 16 units out of the 27 units, but not disclosed and not given to the trust by the first defendant and its directors as at the date of the trial. As a fiduciary, the first defendant had to be accountable to the trust and for the receipt of these payments. The rental was earned secretly and not shared with the trust. There is absolutely no account for the money received from the other 16 units out of the 27 units. These 16 units are the trust properties and any income derived from these properties rightly belong to the trust and thus must be accounted to.

**[142]** The R&M in carrying out his investigation had to rely on the best available evidence in the form of the first defendant's website dated 29 December 2011, the internal memo containing the monthly rental dated 19 March 2009 and the rental receipts issued by the first defendant. The learned judge considered this average sum in para 6(v) of the grounds of judgment and found that the rental the trust would earn from the 16 units as at the date of the judgment based on the first defendant's:

(a) website would be RM12,350,000 for 95 months at the rental rate of between RM5,500–RM9,500 per month;

(b) internal memo would be RM5,942,259 for 95 months at the rate of between RM1,750–RM4,500 per month; and

(c) rental receipts would be RM4,329,625 for 95 months at the rate of between RM1,750–RM3,600 per month.

The average sum which came up to RM7,540,625 was computed and calculated from the above figures obtained from the first defendant is own documents setting out the rate per unit at which the first defendant let out. This computation was made by the R&M based on the first defendant's documents and quoted rates per unit and was not rebutted nor disproved by the defence.

**[143]** Under cl 8.1 of the deed of trust, the trustees shall have prepared by a certified public account financial statements setting out, inter alia, all incomes of the trust fund, capital of the trust fund and investments and money comprised in the trust fund. They have specific responsibility under the deed of trust hence the defendants have to account for incomes and expenses of the trust properties. In our judgment, in the absence of any rebuttal by the defence or evidence to the contrary, the learned judge cannot be faulted for arriving at the finding as he did.

THE CLAIM FOR RM1,010,306

**[144]** We ought to emphasise that the sum of RM26,587 per month was required to be paid by the first defendant to the trust pursuant to the management agreement. This payment was stopped for 38 months from May 2013–June 2016. The plaintiff claims that the payment is continuing and as at June 2016 the sum of RM1,010,306 is due from the first defendant and this is undisputed. The learned judge allowed this claim on the ground that the first defendant had the obligation under the management agreement to pay. The said management agreement, His Lordship held, was valid until it was declared null and void by the High Court on 22 December 2016 and thereafter it became invalid, hence the defendants were liable to pay the sum in question. The learned judge further found that the first defendant had breached the

management agreement and the rest of the defendants had jointly defended the first defendant when they ought to have disassociated themselves from such breach.

**[145]** The learned judge went through the defence own documents and found that under the management agreement that was in place, the first defendant had to pay to the trust the sum of RM26,587 per month to the trust as rental for the leaseback but had failed to do so from May 2013–June 2016 for the period of 38 months. It is important to remember that when the Vernon Ong's order of 11 September 2009 gave possession, custody and control over the trust assets to the R&M, the 27 units were managed by the first defendant under the management agreement. The R&M proceeded to continue this arrangement until the completion of the trial and towards that end, all rentals were paid to the R&M and this continued until May 2013. The first defendant had diligently paid the monthly amount up to April 2013 (save for two payments which were not paid). It is not in dispute that thereafter the first defendant stopped paying the trust the said sum. The first defendant agreed and admitted that they had stopped paying the rental from May 2013 but they alleged that they had the right to stop the payments to the trust as a result of the AMLATFA order dated 12 August 2012 (exh D249) as it prevented any dealings on the 27 units.

**[146]** The learned judge found that the AMLATFA order was served on the fourth defendant but at that material time the fourth defendant was no longer in possession of the 27 units due to the Vernon Ong's order whereby possession was ordered to be handed over to the R&M. On 15 July 2010, almost a year after the Vernon Ong's order, under the threat of committal proceedings, the fourth defendant handed over the 27 original SPAs to the R&M without any other accompanying trust document or any other sale and transaction documents. It is also important to be reminded that when the 106 Suit was commenced by the plaintiff on 19 September 2011, the plaintiff sought interlocutory reliefs for an injunction, Anton Piller order, and other declaratory reliefs which included the 27 units in respect of which the Has Zanahs' order was granted by the High Court on 14 December 2011. By the Vernon Ong's order and Has Zanah's order, all rights, interest, custody and possession of the 27 units were vested by the court in the R&M and affirmed again by this court on appeals filed by the defendants. Both orders thus remain intact.

**[147]** We agree with the learned judge that there was no restriction on the first defendant to pay the monthly rent to the trust. In the result, we cannot accept the defence argument that the management agreement came to an end because of the AMLATFA order. That we think lets in the provisions contained in s 51(1A) of the Act when we deal with this issue. The relevant provisions are

reproduced below:

> (1A) Where any immovable property is seized under this Act, the seizure shall be effected —
>
> (a) by the issue of a notice of seizure by the Public Prosecutor setting out in the particulars of the immovable property which is seized in so far as such particulars are within his knowledge and prohibiting all dealings in such immovable property;
>
> (b) by *serving* a copy of such notice on the *owner* or *person in possession, custody or control* of the immovable property, if known. (Emphasis added.)

**[148]** It is pertinent to note that the AMLATFA order was against the fourth defendant and not the first defendant. During the course of the trial and especially during the examination of the fourth defendant, the issue of the AMLATFA order was not brought to the attention of the court. The very first time the AMLATFA order surfaced was during the examination of the third defendant on 2 March 2016, which was towards the end of the trial and the purpose of which was to justify the first defendant ceasing to pay the rental to the R&M. It was in this context that the issue was raised. Now, taking 6 August 2012 as the date of the seizure, the AMLATFA order is ineffective as the R&M had been in possession, custody and control of the 27 units pursuant to the Vernon Ong's order. Added to that, the restraining order arising out of the Has Zanah's order prevented any dealing with the 27 units which was the very act sought to be preserved by the AMLATFA order. All rights were vested with the R&M by virtue of these two orders of the court. Therefore, on 6 August 2012 the fourth defendant was neither the owner nor person in possession, custody or control of the 27 units as envisaged under s 51(1A) of the Act. The AMLATFA order was clearly addressed to the fourth defendant as the owner of the 27 units. It is also important to remember that the fourth defendant and all other defendants had maintained that the 27 units were the trust properties and by his own admission, the R&M had been in possession, custody and control of the 27 units. The AMLATFA Order clearly mentions that it was addressed to the fourth defendant as the owner of the 27 units and it prohibits him from dealing with the 27 units. However, at that point of time and thereafter he was no longer the owner of the 27 units, hence there is no prohibition or restriction under s 54(3) of the Act. Under the circumstances, s 54(3) of the Act will not even come into play nor does it apply as there had been no dealing with the property there being no effective seizure of the 27 units in accordance with s 51(1A) of the Act in the first place.

**[149]** Even assuming that s 54 of the Act applies, we would say with confidence that there was no dealing with the 27 units that would contravene the AMLATFA order. This is because payment of rental is a continuation of the performance of the first defendant's obligation under the management agreement which was entered into on 3 May 2008. Such payment therefore

does not constitute 'dealing' which the Act seeks to prohibit. The first defendant was only involved in managing the 27 units as stipulated in the management agreement in which the first defendant had to continue the existing state of affairs with respect to which R&M had a vested interest in maintaining the status quo. A perusal of s 3 of the Act on the definition of 'dealing' clearly shows that payment of the rental to the trust does not constitute dealing and these payments do not contravene s 54 of the Act which provides that any dealing of a seized property shall be null and void. This is what s 3 provides for the definition of 'dealing':

> 'dealing', in relation to any property, includes —
>
> (a) receiving or acquiring the property;
>
> (b) concealing or disguising the property (whether by concealing, or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it or otherwise);
>
> (c) disposing of or converting the property;
>
> (d) bringing the property into or removing the property from Malaysia;
>
> (e) using the property to borrow money, or as security (whether by way of charge, mortgage or pledge or otherwise); or
>
> (f) where a debt is owed to the person holding the property, making a payment to any person in reduction of the amount of the debt.

**[150]** The defendants also contradicted each other on this claim when the third defendant said that he was advised by his lawyers in December 2013 on the effect of the AMLATFA order, but there is evidence to show that the first defendant had already stopped paying seven months earlier that is in May 2013. Obviously, the defendants were avoiding their liabilities and were not credible.

**[151]** Learned counsel for the first defendant submitted that the trust is abusing court procedure when on the one hand it seeks to declare the management agreement null and void but, on the other hand it seeks specific performance of the management agreement. Relying on the decision of this court in *Fawziah Holdings Sdn Bhd v Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) and another appeal* [2006] 1 MLJ 505; [2006] 1 CLJ 996, learned counsel for the first defendant pressed with the argument that the plaintiff could not pick and choose, and it could not probate and reprobate. We cannot accept this view. As we have earlier said, the management agreement is void from the date of the judgment. The learned judge accepted that the management agreement was effective and enforceable as between the parties from 3 May 2008 and was in existence until the date of the judgment. The management agreement is therefore valid until judgment was delivered on 22 December 2016. Therefore, the defendants should account for and pay the

rental sum of RM1,010,306 which remains in arrears for 38 months from May 2103–June 2016.

THE CLAIM FOR RM572,473

**[152]** The learned judge ordered the defendants to pay the trust the sum of RM572,473 which was the secret profit earned on the 11 units of the 27 units rented to MINDEF which had not been disclosed to nor shared with the trust. It is undisputed that the monthly rental for the 11 units is RM34,650 out of which the sum of RM26,587 is paid to the trust being monthly rental for the leaseback of the 11 units. The monthly surplus upon paying the monthly rental for the leaseback retained by the first defendant, but not disclosed to the trust, is RM8,063. The tenancy agreement has been extended for a further three years from 1 July 2011–30 June 2014. Therefore, the total number of months for the rented period commencing from 1 August 2008–30 June 2014 is 71 months. The total amount of the secret profit received by the first defendant for 71 months is RM572,473 based on the monthly sum of RM8,063 received and retained by the first defendant. The management agreement did not come about by way of an arm's-length transaction. The learned judge found that the management agreement is a self dealing and one-sided agreement.

**[153]** We accept that if it is an arm's-length transaction situation, it would have been different and the first defendant would have been entitled to keep the sum. However, since the management agreement was declared null and void, the plaintiff's position in this case that this is their money in respect of which the defendants ought to be made liable to pay to the trust cannot be erroneously taken. The defendants, we would say, are in a position of the fiduciary in respect of which they have been found to be in breach. It is contended for the first defendant that the learned judge should have referred to various payments by the first defendant such as payments for water, electricity, maintenance and sinking fund. If these outgoings are taken into account, the margin earned by the first defendant is small and they must be reimbursed for these expenses. The learned judge did consider this argument and found that the first defendant did not prove these expenses.

**[154]** A scrutiny of the record of appeal shows that the documents relied on by the defence are not exhibits as they were not produced through makers nor were originals, and were not marked as exhibits. The learned judge in this connection placed reliance on the R&M's findings as stated in his reports filed with the court below. These reports and findings were not rebutted, hence the findings made were conclusive. In any event, the first defendant never proved the actual sum they actually incurred towards the outgoing expenses. The plaintiff sought details on the 27 units but they are not forthcoming. The first defendant has not given account as to what happened to the money. It is

therefore not open for the first defendant to say they are entitled to be paid or reimbursed. The learned judge could not be wrong when he ordered this sum to be paid to the trust.

**[155]** The law on secret profits as explained by this court in *Tan Sri Dato' Dr Awang Had bin Salleh & Anor v Dato' Dr Haji Mohamed Haniffa bin Haji Abdullah* [2007] 6 MLJ 293; [2007] 5 CLJ 565 is that 'once it was established that one party to a contract had made a secret payment to the agent of the other party, the law would presume that he acted corruptly that the agent had been influenced by the payment to the detriment of his principal and that the principal had suffered damages at least to the amount of the bribe ... and its amount was recoverable ... as damages or money had or received'. Based on the decision of the English Court of Appeal in the case of *Hurstanger Ltd v Wilson and another* [2007] 1 WLR 2351, such receipt would be in breach of his fiduciary duty and 'it was the agent's duty of disclosure that required him to disclose the amount of commission he was to receive; that if there had been no disclosure the agent would have received a secret commission, which was to be treated as a special category of fraud'.

**[156]** The defendants in this respect were clearly in breach of their fiduciary duty when they failed to make full disclosure of all the sums received and retained by them as secret profits. They have to return the money to the trust. Since the defendants did not disprove nor rebut the plaintiff's documentary evidence on the claim for these sums, the judgment of the learned judge was correctly entered.

THE ADDITIONAL 30 UNITS

**[157]** The learned judge declared the trust as the owner of the additional 30 units. Consequent to this declaratory order, the learned judge granted specific and injunctive reliefs with regard to the hand over process and dealings on the additional 30 units as well as an order for all benefits earned to be for the trust.

**[158]** The plaintiff claims that the trust funds were fraudulently used by the third defendant to purchase the additional 30 units of apartments in Lanai Gurney leading to the unjust enrichment of the third defendant. One thing which is quite clear from the scrutiny of the evidence is that the third defendant bought the additional 30 units in his personal name for the price of RM6,283,000 on 20 April 2009 from Galian Unggul Sdn Bhd and took 30 loans from three banks namely Affin Bank to purchase 12 units, CIMB Bank to purchase two units and the intervener, that is MBB, to purchase 16 units. The purchase was made after the first defendant had received the RM7m from the trust and increased its share capital by that amount.

**[159]** The third defendant paid part of the initial payment of 10% in the sum of RM228,300 using two MBB cheques in the sums of RM100,000 dated 22 December 2009 and RM128,300 dated 29 January 2010. The two cheques came from the first defendant. These sums constituted the trust fund as the first defendant's revenue was derived from rental proceeds received from the trust's 27 Units. There is no dispute in respect of these two sums being used towards the payment of the 10% deposit for the purchase of the additional 30 units. The third defendant claimed that the money came from him. However, there is no shred of evidence including documentary evidence adduced by him to show that it was so. On the other hand, the evidence that we glean from the R&M's eighth report (exh P15) in particular the audited financial statement of the first defendant for the year ended 30 June 2009 reveals that the sum of RM784,753 represents the revenue from rental and maintenance charges, whereas the audited Financial Statement for the year ending 30 June 2010 reveals that the sum of RM969,800 at note 10 thereto also represents the revenue earned from rental and maintenance charges received during the year ending 30 June 2010. In addition, Appendix 11 to the R&M's tenth report exhibit the total rental and expenditure report for the 27 units for the years of 2008–2011.

**[160]** It clearly shows that the first defendant earned rental from the 11 units rented to MINDEF and rental earned from the remaining 16 units which were earned by way of secret profits from the 27 units belonging to the trust. The evidence led by the plaintiff shows that the first defendant was incorporated on 5 April 2007 and the management agreement was signed on 3 May 2008 lending credence to the plaintiff's contention that the rental earned between 2008–2011 came from the tenancy of the 11 units and the remaining 16 units. The total rental and expenditure report also reflects the position of the defendant that they earned rental by renting out the 27 units.

**[161]** When the third defendant gave his witness statement, at Question 83, he said that the first defendant paid the two cheques each in the sum of RM128,300 and RM100,000 using the first defendant's MBB cheques. He also claimed that he paid the money to the first defendant first, however he could not show a scrap of evidence to prove his claim. A question which immediately arises is, why was there the need to pay the first defendant and the first defendant in turn issued the two cheques for the purchase of the additional 30 units whilst in truth the third defendant was the purchaser for the additional 30 units. The learned judge was correct in holding that it was the third defendant who should have issued the two cheques for the part payment of the 10% deposit. In our opinion that was, as was to be expected, the logical thing for the third defendant to do since he was the purchaser. We agree with the learned judge that the third defendant could not be believed when he claimed that he paid from his own fund when he purchased the additional 30 units

which was not supported by any evidence. The truth is that the first defendant's two cheques show that the payments came from the rental belonging to the trust which was derived from the tenancy of the 27 units. The defence contention that these payments did not come from the trust cannot therefore be accepted.

**[162]** The third defendant took 30 loans from three banks to pay for the balance purchase price of 90%. For this purpose, he took 16 loans for 16 units from the intervener, 12 loans for 12 units from Affin Bank and two loans for two units from CIMB. Evidence is led to show that the security for the loans of 90% from the intervener and Affin Bank was the assignment of the monthly rental proceeds of the trust's 27 units. This evidence can be discerned from the first defendant is letter dated 11 January 2011 (exh P250), signed by the third defendant as its director, and sent to the intervener wherein he undertook to remit all rental proceeds obtained from the tenancy agreement dated 14 August 2008 with MINDEF. This letter states that the remittance of all rental proceeds from the said tenancy agreement 'only to the extent of the loan sum payable by our director, Mr Dinesh Kanavaji to Malayan Banking Berhad' for the 16 housing loans granted by the intervener to him. Similarly, by a director's resolution of the first defendant signed by the second and third defendants, the monthly rental proceeds receivable from MINDEF pursuant to the tenancy agreement of 14 August 2008 were assigned to Affin Bank Bhd to the extent of the monthly repayment due from the third defendant to the said bank for the 12 housing or personal loans granted to the third defendant.

**[163]** In the midst of his cross-examination, the third defendant on 17 January 2016, after literally four years of trial and when the trial was at its tail end, produced three sets of bank documents namely, the deeds of assignment between him and the intervener, Affin Bank and CIMB signed in February and March 2011 wherein the third defendant assigned the additional 30 units to these banks as a continuing security for the payment of monies owing or payable to the banks (exhs D229, D230 and D231). However, the letter of undertaking mentioned above (exh P250) issued by the first defendant and the letter of assignment reveal that the instalments for loan repayment were secured by assigning all the rental proceeds earned by renting out the 11 units. These deeds of assignment could not have been the security documents by assignment of the additional 30 units. The reason for this finding is that pursuant to the absolute assignment agreement dated 5 March 2015 between Idaman Spektra Sdn Bhd as the vendor and the third defendant as the purchaser, in respect of the 16 units of which 16 loans were taken from the intervener (exh P25 (1–16), these 16 units were only assigned and transferred by the former to the latter on 5 March 2015. As far as Affin Bank and CIMB

are concerned, no documents were put forward as to when the third defendant obtained the assignment and transfer of the remaining 14 units from Idaman Spektra Sdn Bhd.

**[164]** Obviously, the third defendant failed to prove by his documents that the assignments of the additional 30 units were in order and constituted the alleged proof that he had funded his own loans. The learned judge was correct when he found that the assignment of the 16 units to the intervener was in actuality not the assignment of the said 16 units because the assignment and transfer of the same by the vendor only took place in 2015. These deed of assignments were purportedly executed in 2011 when the loans were granted, as such when the third defendant claimed that these assignments were collateral, it cannot be true because in 2011 he was in no position to assign the property to the banks since the vendor had not assigned and transferred the same to the third defendant.

**[165]** It is clear to us that by these two letters of undertaking and assignment, the loans repayment for these units that the third defendant had purchased were secured by way of remitting and assigning all rental proceeds obtained from the tenancy agreement with MINDEF for the 11 units. It cannot be said, as submitted by learned counsel for the third defendant, that the finding made by the learned judge on this point was purely based on the plaintiff's suspicion bereft of any conclusive proof. In our judgment, these documents, being documentary proof, speak for themselves and are very clear and unequivocal. If the loans repayment did not come from all the rental proceeds from the tenancy of the 11 units, a pertinent question to ask is why were these undertaking and assignment letters issued to the intervener and Affin Bank. There was no explanation given as to the existence of these documents and, in the absence of any rebuttal, it thus becomes reasonable to conclude that it would be wholly wrong for learned counsel to submit that the plaintiff had misled the court by concealing the actual fact. The reality is that these proven facts were not rebutted by the defence. If the plaintiff's case is not true as the defence had sought to portray, the defendant could have easily demolished the plaintiff's evidence by showing the source of his funds from which he paid the instalments for his 30 personal loans. In that way, the third defendant could show that the instalments were not sourced from the trust assets or funds. The third defendant however plainly failed to show the requisite evidence and there is absolutely no doubt that he is the only person who can account for this.

**[166]** Accordingly, we are of the opinion that the above documents show that the monthly payments for the 30 loans extended to the third defendant were paid by the assignment of the rental proceeds earned by way of secret profits from the 27 units belonging to the trust, which constituted fraud, unjust enrichment and/or monies had and received from the trust. Based on the

evidence adduced at the trial and there being no plausible evidence in rebuttal, the learned judge was correct in concluding that these additional 30 units were in fact purchased using the trust monies, and in granting the declaration that the trust is the owner of these additional 30 units as well as specific and injunctive reliefs.

LIABILITY OF THE FIRST TO SEVENTH DEFENDANTS

**[167]** We shall next address the issue of liability of the first to seventh defendants in this case in respect of the claim made against them. The learned judge found all the defendants to be liable to account to the trust all monies earned for the trust and any asset obtained using the trust money withdrawn from the trust fund. Save for the fourth defendant, who was undisputedly the trustee at the material time, the rest of the defendants by virtue of their dealing with the trust properties and monies, are in actual fact constructive trustees for the trust. We have been told that the fourth defendant's application for leave to the Federal Court had been dismissed by the said court. Consequently, the fourth defendant as we earlier held, is bound by our decision and the decision of the High Court against him remains intact. In law, where injury has been done to or loss has been suffered by the plaintiff and such injury or loss as the case may be, was caused by any defendants being joint tortfeasors, as with the case herein, all the defendants, whose acts have been a proximate cause of the injury or loss, must compensate for the whole of it. Even if the defendants are not joint tortfeasors but are acting severally and not in concert, when injury has been done to or loss has been suffered by the plaintiff, the injury or loss, as the case may be, is the same or indivisible, and the defendants, whose acts have been the proximate cause of the injury or loss, are liable for the same damage and must also compensate for the whole of it. Where there are more than one of such persons, it is immaterial to the plaintiff whether they are joint tortfeasors or not. A consideration of the decision of this court in the case of *Arab-Malaysian Finance Bhd*, confirms the view which we have expressed above. We refer to p 598 of the judgment of this court in the above case which we reproduce below:

> Learned counsel for the fifth defendant also argued that even if his client was partly liable, it was not a joint tortfeasor and was therefore not liable to foot the whole bill before seeking contribution from the co-defendants.
>
> The answer to this argument is to be found in the following passage in the judgment of Choor Singh J in *Oli Mohamed v Keith Murphy & Anor* [1969] 2 MLJ 244 at p 245:
>
> > Counsel for the second defendant submitted that if the court holds that both defendants were equally negligent, then the judgment against the second defendant should be only for 50 per cent of the total sum.

Assessed as damages in this case. In my opinion this submission also fails. It is clear law that if each of several persons, not acting in concert, commits a tort against another person substantially contemporaneously and causing the same or indivisible damage, each tortfeasor is liable for the whole damage. See *Dingle v Associated Newspapers Ltd* [1961] 2 QB 162 and *Drinkwater v Kimber* [1932] 2 QB 281. In *Dingle's case, Devlin LJ* said at p 188:

> ... Where injury has been done to the plaintiff and the injury is indivisible, any tortfeasor whose act has been a proximate cause of the injury must compensate for the whole of it. As between the plaintiff and the defendant it is immaterial that there are others whose acts also have been a cause of the injury and it does not matter whether those others have or have not a good defence. These factors would be relevant in a claim between tortfeasors for contribution, but the plaintiff is not concerned with that; he can obtain judgment for total compensation from anyone whose act has been a cause of his injury. If there are more than one of such persons, it is immaterial to the plaintiff whether they are joint tortfeasors or not. If four men, acting severally and not in concert, strike the plaintiff one after another and as a result of his injuries he suffers shock and is detained in hospital and loses a month's wages, each wrongdoer is liable to compensate for the whole loss of earnings. If there were four distinct physical injuries, each man would be liable only for the consequences peculiar to the injury he inflicted, but in the example I have given the loss of earnings is injury caused in part by all four defendants. It is essential for this purpose that the loss should be one and indivisible; whether it is so or not is a matter of fact and not a matter of law ...

By the common law the plaintiff is entitled to recover the whole of the damages awarded in this case.

Our Federal Court in *Malaysian National Insurance Sdn Bhd v Lim Tiok* [1997] 2 MLJ 165 at p 186, affirmed the common law principle. Edgar Joseph Jr FCJ, a judge whose judgments are entitled to great respect said:

> To recapitulate, at common law, if each of several persons, not acting in concert, commits a tort against another person substantially contemporaneously and causing the same or indivisible damage, each tortfeasor is liable for the same damage.

So too here. The plaintiffs are entitled as a matter of law to enforce the whole judgment against any of the defendants before us, including the fifth defendant. The argument of the fifth defendant cannot therefore be accepted.

**[168]** We have cited the case of *Malaysian National Insurance Sdn Bhd v Lim Tiok*, very early in our judgment. The Federal Court there in considering a similar issue of independent tortfeasors authoritatively held:

> The next question to be logically considered is: what is the sum which the third party could have recovered against the insured in the present case where you have a situation involving independent tortfeasors with an apportionment of responsibility between them under an order of court?

A To recapitulate, at common law, if each of several persons, not acting in concert, commits a tort against another person substantially contemporaneously and causing the same or invisible damage, each tortfeasor is liable for the same damage (see *Oli Mohamed v Keith Murphy & Anor* [1969] 2 MLJ 244 at pp 245 col 2E to 246 col 1A, per Choor Singh J applying *Dingle v Associated Newspapers Ltd & Ors* [1961] 2 QB 162 and *Drinkwater v Kimber* [1952] 2 QB 281).

B Here, Yap Mun Chuan, Chai Ten Wai and vicariously the insured, were undoubtedly independent tortfeasors and each was liable for the same damage caused, and therefore each is liable to pay the total sum of the damages, costs and interest payable under the consent judgment dated 5 June 1986 notwithstanding that fact that responsibility for the accident had been equally apportioned between them under the supplemental consent order dated 26 September 1991 (see *Oli Muhamad v Keith Murphy & Anor* at pp 245 col 2E to 246 col 1A). It follows that since this is the sum which the third party can recover from the insured, this is also the sum which the third party is entitled to recover from the insurer. In other words, this is he sum which the insured is 'legally liable' to pay to the third party within the meaning of the 'liability to third party' clause of the policy, reproduced above, and this is also the sum for which the insurer is bound by statute to indemnify the insured.'

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**[169]** We consider that the above decisions deal with the issue of negligence involving independent as well as joint tortfeasors and we are of the view that the principle laid down in both cases premised on the common law is applicable to the instant case which is also founded, inter alia, on negligence, breach of duty of care, fraud, conspiracy to injure as well as breach of fiduciary duty. Based on the material facts garnered from the evidence, the injury or loss suffered by the plaintiff is clearly the same and indivisible, accordingly whether all the defendants are joint tortfeasors or otherwise, each of them is liable for the same damage. In the event, all the defendants including the fourth defendant, whose appeal herein had been struck out earlier, are correctly found to be liable by the learned judge.

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## THE INTERVENER'S CLAIM

**[170]** The intervener, that is Malayan Banking Bhd, has been made a party by this court following their application dated 29 June 2018 which was allowed by us on 9 July 2018 before the hearing of these appeals began. The intervener's case concerns their alleged claim on 16 units out of the additional 30 units purchased by the third defendant whereby ownership thereof was ordered to be in favour of the trust by the learned judge after full trial in the court below. Learned counsel for the intervener at the beginning of his oral submission stressed that the intervener is the owner of the 16 units. This position is also stated very clearly in his written submission. Therefore, the purpose of the intervention herein, according to learned counsel for the intervener, is to protect the intervener's interest in the 16 units, the purchase whereof by the third defendant has been financed by the intervener and the 16 loans accounts

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thereof still have outstanding balance. The intervener in this intervention opposes those parts of the judgment of the learned judge made on 22 December 2016 that allegedly impinges on their ownership of the 16 units and seeks to have them set aside insofar as they relate to the 16 units in question. The said impugned parts of the High Court's order are para 2 which declares the trust to be the owner of the 16 units, and paras 9, 10, 11 and 12 which are ancillary orders relating to the hand over process of these 16 units to the trust.

**[171]** The 16 units, as earlier stated are part of the additional 30 units of the Lanai Gurney Apartments. The Dewan Bandaraya Kuala Lumpur (DBKL) is the owner of the land whereas the eighth defendant is the developer. By 16 sale and purchase agreements, DBKL as the land proprietor acquired the said 16 units from the eighth defendant. Pursuant to subsequent 16 sale and purchase agreements, Idaman Spektra Sdn Bhd acquired the said 16 units from DBKL. Subsequently, as the evidence shows, in 2010 the third defendant purchased the 16 units from Idaman Spektra Sdn Bhd. Upon request by the third defendant, the intervener entered into 16 loans agreements in 2011 with the third defendant to finance the purchase by the third defendant of the 16 units, with a loan margin of 90%. The loan was disbursed to Idaman Spektra Sdn Bhd in 2011. It is the intervener's position that, as security for the loan, the third defendant duly executed 16 deeds of assignment on 4 March 2011 whereby the third defendant absolutely assigned whatever he then had in the 16 units to the intervener. For the intervener, it has been pressed upon us that the owner of the 16 units is the intervener and the failure by the plaintiff to make the intervener a party to the 106 Suit is a breach of natural justice of sufficient gravity that will render the impugned parts of the order a nullity.

**[172]** The argument at the core of the intervention before this court is that the 16 deeds of assignment given by the third defendant to the intervener by way of security for loan is an absolute assignment not by way of charge, hence falling within s 4(3) of the Civil Law Act 1956. Accordingly, learned counsel submitted, the right party and owner of the real estate without title is the intervener. He bolstered this argument by reference to the decisions of the Federal Court and the Supreme Court that had repeatedly held as such since 1984–2015. These cases are:

(a) *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 (FC);

(b) *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149 (SC);

(c) *PhileoAllied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor* [2002] 2 MLJ 513; [2002] 2 CLJ 621 (FC); and

(d) *Damai Freight (M) Sdn Bhd v Affin Bank Bhd* [2015] 4 MLJ 149 (FC).

**[173]** A perusal of the decisions of the above cases in summary shows that loans were granted by the bank to finance the purchase of the property and the borrower, as assignor, executed an assignment of all rights, title and interest in the property purchased by them. Both the Federal Court and the Supreme Court in these cases held that the deed of assignment was absolute assignment and not purporting to be by way of charge only within the meaning of s 4(3) of the Civil Law Act 1956. The assignment was in terms absolute in the sense that the assignor intended to pass to the assignee, that is the bank, absolutely the beneficial interest as well as all the rights title and interest in the sale and purchase agreement. The instrument is absolute because of the use of the word 'absolutely'. If the assignment was an absolute one, not purporting to be by way of charge only, within the meaning of s 4(3) of the Civil Law Act 1956, then the assignor was not entitled to sue in its own name but the action should be brought by the assignee.

**[174]** We are also pressed by learned counsel on behalf of the intervener with the importance of the strict requirement for the plaintiff to make all interested parties defendants, for the failure to do so would significantly render any order that the former secures a nullity for breach of natural justice. In support of his contention, learned counsel referred to *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393, *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374, *London Passenger Transport Board v Moscrop* [1942] AC 332, *Zulkiflee bin Abdul Samad v Segi Objektif (M) Sdn Bhd* [2016] MLJU 1333, *Ang Game Hong & Anor v Tee Kim Tiam & Ors* [2018] 4 MLJ 432 and *Selvam Holdings (Malaysia) Sdn Bhd v Grant Kenyon & Eckhardt Sdn Bhd (BSN Commercial Bank Malaysia Bhd & Ors, interveners)* [2003] 1 MLJ 251. To put it in simple terms, the point learned counsel is trying to make is that where the intervener has established their interests in the outcome of the case, they have to be cited as the party. Failure to do so will entitle the intervener to set aside the order ex debito justitae in the same proceedings in which the order dated 22 December 2016 was made. To begin our deliberation on the intervener's claim, it might be apposite to be reminded that the judgment dated 22 December 2016 has been obtained by the plaintiff against the third defendant and six other defendants on causes of action that do not concern nor involve the intervener. The third defendant himself expressly opted not to make the intervener a party nor called them as their witness in this case. We would say therefore that the intervener in seeking to set aside the judgment is indirectly assisting the third defendant in his appeal to this court to set aside the judgment or findings of fact made against him which cannot be the case and in effect would be a second bite of the cherry.

**[175]** The intervener had granted 16 loans to the third defendant and allegedly had taken an 'assignment' over the 16 units. The intervener therefore claims that the 'ownership' of the 16 units belongs to them and hence they have legal rights over the said 16 units. It has been shown to this court that the intervener was fully informed of the trust's claim filed in the High Court from 2012, and had been fully informed on 3 January 2017 of the judgment which had ordered that ownership of the 16 units belonged to the trust on the evidence that had been put before the court below. This is evident from the plaintiff's affidavit affirmed on 6 June 2018 and the letters exchanged between the plaintiff, the intervener's lawyers and their legal department. We are mindful of the intervener's position that none of the documents exhibited to this affidavit notified the intervener that the plaintiff had claimed ownership of the 16 units. In our judgment, all these letters were intended to inform the intervener of the plaintiff's claim against the 27 units and the additional 30 units. If that was not the case, we do not see any reason or logic on the part of the plaintiff in writing to the intervener because the latter was not involved in the 106 Suit save the 16 units as part of the additional 30 units. Those letters could not have been written in a vacuum. They were written because of the 16 units and it was intended to inform the intervener of the ongoing legal action involving the same of which they are not a party. That was the sole purpose for which the plaintiff had written to them on several occasions. The intervener could not thus plead ignorance of the true intent and purport of all these letters.

**[176]** Apart from the said letters, there were telephone conversations between the plaintiff's lawyer and the head of legal department of the intervener and their lawyer and once again such conversations could not have been made in a vacuum nor without a full understanding of what was the ongoing legal action which was the formal heading on the said letters that were exchanged. The intervener has been put on full notice of the ongoing 106 Suit and has not given any explanation as to why they did not take steps to intervene. In fact the intervener categorically stated and was indeed contented with their position that they were not going to intervene and that the issues in dispute were between the third defendant and the plaintiff. It is an undisputed fact that the intervener did not take any step to intervene in the High Court at all until the conclusion of the trial and even then the application to intervene filed in the High Court was only made on 26 July 2018, after considerable delay and without any cogent explanation being given for such delay. They are now applying to this court to intervene in these appeals.

**[177]** We are aware that pending the disposal of the application before this court, the intervener's application to intervene before the High Court has been stayed. In any event, these issues that the intervener did not have knowledge and the fact whether they chose not to intervene, are matters which ought to be

ventilated by way of fresh proceedings and are not for this court to now determine. Learned counsel for the intervener cannot render self-serving interpretations of the contents of the letters that were exchanged as they are doing in their written submission in particular paras 27–30 thereof. This fortifies the need for separate proceedings.

**[178]** The intervener subsequently and also after the considerable unexplained delay, filed the application to intervene on 29 June 2018 in this court. The intervener had the requisite knowledge and opportunity to intervene to have itself added as a party to the case, but failed to do so at the earliest opportunity. The application was made a tad late in the day. In the case of *Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor* [1995] 1 MLJ 668 this court in dealing with the issue of delay held that the applicant could not now claim to have an independent right of appeal. This was because pursuant to the principle founded on justice and common sense, if a person knowing what was passing but was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result and not be allowed to reopen the case. The averments made in the intervener's affidavit affirmed by Nor Lida Hassan on 27 June 2018 that the intervener came to know of the proceedings on or about 1 June 2018 could not therefore be true, and their claim that upon further inquiries made with the plaintiff's solicitors they came to know that the titles were with the plaintiff is also incorrect and not true as can be gleaned from the exchange of correspondence.

**[179]** We take cognizance of the fact that the third defendant had, after the court below was functus officio, on 24 May 2018 filed a notice of application in the High Court seeking orders for the plaintiff to settle the third defendant's loans in respect of the additional 30 units, and the intervener had, around 26 July 2018, also filed an application to intervene in the High Court in the said third defendant's application in respect of the 16 units. The intervener's application to intervene in the court below in respect of the 16 units is clearly an abuse of process of court as they have already intervened in these appeals. It is therefore incumbent on the intervener to now show to this court where and how the decision of the learned judge on 22 December 2016 was wrong, which findings made by the learned judge were on the same intervener's documents that had been adduced in the court below as are now being adduced before us.

**[180]** The plaintiff's claim against the first defendant in the High Court with regard to the 16 units is clearly set out in the statement of claim in paras 6.2–6.4 which are set out for ease of reference below:

> 6.2. The plaintiff states that the 1st Defendant's accounts do not reflect that it had the funds to purchase the 27 Units for RM7,000,000.00 and the Additional 30 Units for RM6,283,000.00 unless it utilized the Trust funds released to it in the sum of RM7,000,000.00 and the *income earned from the lease/tenancy of the 27 Units*.

The plaintiff avers that the 1st Defendant has *wrongfully utilized the aforesaid monies or other Trust monies and/or the 27 Units by way of security to enable it to purchase the Additional 30 Units or vice versa and the particulars of the aforesaid wrongful use of Trust monies can only be ascertained after a full trial* and upon the relevant orders for tracing being made.

6.3. The plaintiff avers that the 1st to 5th Defendant have committed *fraud and have unlawfully utilized the Trust monies and/or its assets to unjustly enrich themselves and or to purchase the additional 30 Units*.

6.4. In the alternative the Plaintiff contends that the 1st to 5th defendants *had and received monies to the use of the Plaintiff*. (Emphasis added.)

**[181]** The defendant's defence to the above claim is found in para 6.2–6.4 of the statement of defence and it reads:

6.2. Defendan-Defendan merujuk kepada perenggan 6.2 Pernyataan Tuntutan dan mempertikaikan kandungannya dan meletakkan ke atas pihak Penerima dan Pengurus Interim dan/atau Plaintiff kepada beban kebuktian yang kukuh. Defendan-Defendan Kedua, Ketiga dan Keempat mengesahkan bahawa RM7,000,000.00 yang diterima oleh Defendan Pertama adalah 100% digunakan untuk membeli 27 hartanah tersebut bagi manfaat Amanah dan jumlah tersebut tidak digunakan untuk membeli 30 hartanah tambahan yang dibeli oleh Defendan Ketiga.

6.3. Defendan-Defendan merujuk kepada perenggan 6.3 Pernyataan Tuntutan dan mempertikaikan kandungannya dan meletakkan ke atas pihak Penerima dan Pengurus interim dan/atau Plaintiff kepada beban kebuktian yang kukuh. Defendan-Defendan Kedua, Ketiga dan Keempat menyatakan dan menegaskan bahawa Defendan-Defendan Pertama hingga Kelima tidak melakukan fraud atau menggunakan wang Amanah secara tidak sah untuk apa-apa tujuan sama ada untuk memperkayakan diri atau membeli 30 hartanah sebagaimana yang diplidkan pihak Penerima dan Pengurus Interim dan/atau Plaintif.

6.4. Defendan-Defendan merujuk kepada perenggan 6.4 Pernyataan Tuntutan dan mempertikaikan kandungannya dan meletakkan ke atas pihak Penerima dan Pengurusan dan/atau Plaintif kepada beban kebuktian yang kukuh.

**[182]** The third defendant in the course of the trial defended the plaintiff's claim by stating that he had not used the trust funds to purchase his additional 30 units but that he had obtained financing for the same, that is 16 loans from the intervener for 16 units, 12 loans from Affin Bank for 12 units and two loans from CIMB for two units. However, the above facts are not pleaded in the statements of defence. The third defendant, as we have stated earlier, failed to prove this. The following documents between the defendants, the plaintiff and the intervener were adduced as evidence in the High Court:

(a) the principal sale and purchase agreement dated 9 December 2005 between DBKL and the developer namely the eighth defendant;

(b) the sale and purchase agreement dated 16 August 2010 between DBKL and Idaman Spektra Sdn Bhd;

(c) the deed of assignment (by way of transfer) dated 24 September 2010 between DBKL and Idaman Spektra Sdn Bhd;

(d) the sale and purchase agreement dated 14 February 2010 between Idaman Spektra Sdn Bhd and the third defendant;

(e) the deed of assignment (by way of transfer) dated 5 March 2015 between Idaman Spektra Sdn Bhd and the third defendant adduced by the plaintiff; and

(f) the deed of assignment (by way of security) dated 4 March 2011 between the third defendant and MBB.

**[183]** We are in complete agreement with the finding made by the learned judge that the intervener's deeds of assignment dated 4 March 2011 cannot be valid in light of the fact that the third defendant only secured the rights to the 16 units in 2015. We are aware that learned counsel for the intervener in his oral submission candidly informed this court that he was not relying on the said deeds of assignment (by way of transfer) dated 5 March 2015 between Idaman Spektra Sdn Bhd and the third defendant. The question that has immediately arisen therefore is that if such documents are not being relied upon, what rights to title and interest did the third defendant then assign to the intervener on 4 March 2011. The intervener must show the rights to title and interest that the third defendant then assigned to them. In our judgment, where a bank takes an assignment on property, the party assigning the rights to the bank, that is the assignor, must have the rights in the first place.

**[184]** We have earlier found that the first defendant's audited financial statements for the period between July 2009–June 2010 and the total rental and expenditure reports for the 27 units for the years of 2008 to 2011 that were adduced in the High Court proved that the revenue earned by the first defendant for the year 2010 was earned from the rental proceeds collected from the trust's 27 units. It was from the first defendant's account that the third defendant drew two cheques for the deposit payments with respect to the purchase of his additional 30 units claiming it was his 'personal' and 'family' money but he did not establish how and why such 'family' monies found their way to the first defendant's account from which the deposit was paid. The learned judge held that the defence version was not true as he took into account and judicially appreciated that if the third appellant was the purchaser who paid with 'family' monies, why didn't he issue his own cheque?

**[185]** The first defendant's letter of undertaking dated 11 January 2011 to the intervener assigning the rental proceeds on the trust's 27 units to the intervener

as security for the third defendant's loans without any doubt proved that such rental proceeds were paying for the third defendant's 16 personal loans. The said first defendant's undertaking must be read together with the tenancy agreements between the first defendant and MINDEF dated 14 August 2008 and 14 April 2011 for the 27 units.

**[186]** It is clear to us that from the aforesaid documents there was no assignment of rights to the 16 units to the intervener on 4 March 2011 as the third defendant only received the rights to the 16 units on 5 March 2015. The documents indeed speak for themselves.

**[187]** Our attention is drawn to the fact that from the trial transcripts of 17 January 2016, it can be seen that the third defendant, at the tail end of the trial, wished to adduce the deeds of assignment between himself and the intervener and was fully aware of the plaintiff's stand that it was entirely up to the third appellant if he wished to rely on the documents or call the intervener's representative as a witness. The third defendant raised these same issues of the intervener as the 'owner' of the 16 units and all rights had been assigned to the intervener. He opted to rely on the documents, and opted not to call the intervener's representative as a witness to prove his defence. Based on the scrutiny of the notes of evidence, it is plain that the third defendant in fact 'challenged' the plaintiff to produce documents to show that his assignment to the intervener was invalid. Such challenge was in the result accepted, documents were adduced and the documents adduced speak for themselves, making all the third defendant's oral testimony untrue and making the intervener's deeds of assignment invalid. Having considered the defendant's pleaded defence and accepted the undisputed documentary evidence before him, the learned judge was absolutely correct in his factual findings and in rejecting the said defence in his decision.

**[188]** Furthermore, the trial judge was presented with the aforesaid documentary evidence and he accepted the same as the said evidence was unrebutted and we need only say on this aspect that such documentary evidence could not be so rebutted either in the court below or even in these appeals. The intervener has not rebutted the existing documents nor have they produced any new documents that had not been adduced before the learned the trial judge in respect of which he made his findings. As such, it is manifestly wrong for the decision of the learned judge to be set aside as sought by the intervener because it has not been shown to be erroneous and that the trial judge had not fully appreciated the evidence before him. The learned judge in this regard found for a fact that:

(a) the third defendant lied in his testimony and witness statement about the additional 30 units and the financing of the same;

(b) the third defendant had not proved that the monies to purchase the additional 30 (including the 16) units came from himself nor had he proved that the instalments for his loans from the intervener were being paid by him as both the deposit and loan repayments came from the trust funds;

(c) the 16 deeds of assignment to the intervener dated 4 March 2011 could not be valid in light of the fact that the third defendant secured the rights to the 16 units only in the year 2015; and

(d) when the third defendant testified that the 16 loans paid for the 16 units he had not proved this.

**[189]** In light of the aforesaid finding of facts on the same issues that had been raised by the defence and on the same documents adduced in the court below, which same issues and documents are now being adduced by the intervener in these appeals, the intervener having intervened is under the burden to show where the learned trial judge went wrong or how the judgment is illegal, or made without jurisdiction and hence a nullity. The intervener has not so shown any of this and that there is obviously nothing new that the intervener has adduced by intervening to make the findings of the learned judge incorrect or wrong or show that he had not judicially appreciated the evidence before him.

**[190]** It must be taken to be well settled that once a party has intervened in an action, they must establish a claim against the parties in the existing action for which they then seek relief. The intervener has no cause of action against the plaintiff and is merely seeking to impeach the judgment on grounds that it is a nullity as they were not made a party. In reality the intervener has a claim against the third defendant as their borrower and their 'assignor'. The judgment is between the trust and the third defendant. The intervener's rights against the third defendant as borrower are unaffected and if affected are to be ventilated in separate proceedings between them. While the intervener has granted 16 loans to the third defendant, the legal and binding effect of the intervener's claim for these loans from the third defendant as the borrower are not diminished nor affected in any manner by the judgment.

**[191]** Leaving aside the fact that the 16 deeds of assignment between the intervener and the third defendant are not valid, it ought to be emphasised that a legal right of assignment to the intervener merely gives them an equitable charge with the right to foreclose on default and does not make the intervener the 'owner' or 'proprietor' of the said 16 units. The intervener, as against the borrower, preserves the right to foreclose provided that the documents are in order and proper. The deeds of assignment in this case are treated as equitable mortgages where the intervener is the equitable mortgagee. The Federal Court in the case of *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ

1; [2015] 8 CLJ 944 in dealing with this subject held that the deeds of assignment are treated as equitable mortgages and explained the effect of an absolute assignment as follows:

> [40] We agree with the Court of Appeal that the deeds of assignment in the present case are treated as equitable mortgages (where the respondent was an equitable mortgagee) of the earlier purchasers' rights, titles and interests under the sale and purchase agreements.
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> [41] The law on assignment is governed by s 4(3) of the Civil Law Act 1956, which provides:
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> > Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the rights of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.
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> [42] The effect of an absolute assignment was explained at length by the Federal Court in *Chuah Eng Khong v Malayan Banking Bhd* [1998] 3 MLJ 97; [1999] 2 CLJ 917, 920 as follows:
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> > At common law and under the relevant rules of equity, the said loan agreement would amount to an equitable mortgage because the assignment of the right, title and interest in the said land was expressly or obviously for the purpose of securing the loan given to the borrower to purchase the said land. The said loan agreement is not an out-and-out purchase of the said land. This view is reinforced by the promise that when the document of title of the said land was available after the completion of the subdivision aforesaid, the borrower would execute a charge in favour of the lender according to the provisions of the National Land Code (hereinafter called 'the Code'). It is true that nowhere in the said loan agreement has the word 'mortgage' been used, but it is a security transaction in connection with the loan given by the lender with a provision for repayment after which, the borrower 'shall be entitled ... to obtain a discharge and release of the said lot from the lender, (see cl 27 of the said loan agreement). Thus we have the loan, the contractual right to repay or to redeem the said land and the assignment of all 'right title and interest' in the said land pending the exercise of such contractual right to redeem. The said loan agreement therefore, at common law, will be a mortgage. It would be an equitable mortgage (and not a legal mortgage) because the borrower at the time of signing the said loan agreement had no legal estate (or registered proprietorship of a grant of land etc) but only an equitable interest as a purchaser by contract from a housing developer, pending the issuance of a separate document of title aforesaid. In other words, it is a mortgage in equity for which the actual form of words is immaterial provided the meaning is plain when interpreting a document as a

mortgage or equitable mortgage, see *William Brandt's Sons and Co v Dunlop Rubber Co Ltd* [1905] AC 454, 462.

[43] As the loan agreement with the appellant is in law an equitable mortgage, it follows that the respondent in the present case became an equitable mortgagee. In *The Law of Real Property* (5th Ed) by Sir Robert Megarry and HWR Wade at p 914, the learned authors state that 'a mortgage is a conveyance of a property legal or equitable subject to a right of redemption'. This concept of equitable mortgage has been recognised by the Federal Court in *PhileoAllied Bank (Malaysia) Bhd v Bupinder Singh Avatar Singh & Anor* [2002] 2 MLJ 513; [2002] 2 CLJ 621, where it was held:

> All things considered, we were more inclined to agree with learned counsel for the Appellant, in particular with his submission that in the absence of any statutory provisions or common law requiring the equitable mortgagee to obtain a court order to realise its security under an absolute assignment of rights to land, the court should give effect to and recognise the contractual rights as determined between the vendor and the purchaser.

[44] We are in full agreement with the above principle. In the present case, the loan was fully disbursed by the respondent by 13 February 2003 to the developer (BMP), and the earlier purchasers, as the borrowers in the loan agreements defaulted in their repayments of the loans as stipulated under cl 1.1 thereof, thus triggering an event of default under cl 30.1. That being the case, the respondent was entitled to invoke cl 3(a) of the deeds of assignment ie 'to deal with all the rights and interest in relation to the said property absolutely and beneficially'.

[45] To strengthen the respondent's rights and interests on the lot, MPM and BMP had issued letters of undertaking in favour of the respondent. In the said letters of undertaking dated 13 December 2001, MPM consented to the deeds of assignment issued by the earlier purchasers in favour of the respondent and undertook to take all reasonable steps to obtain separate issue documents of title to the land and, subsequently, to deliver to the respondent 'the separate document of title to the said property upon issue thereof together with the registrable transfer in favour of the assignor or any other documents as shall be incumbent upon us to produce to secure the registration of the assignor as the registered proprietor of the said property within six months from the date hereof'. The terms of the undertaking are clear and unambiguous. Therefore, both MPM and BMP are legally obliged to honour their undertakings.

**[192]** Mindful of the trite legal position, the essential point that we wish to make is that the declaratory type of relief sought by the intervener that they are the 'owner' is misplaced. Since the intervener cannot be said to be the 'owner' by virtue of an assignment both in law and fact, the second issue of breach of natural justice is academic and ought to be rejected.

**[193]** The intervener's relief in seeking to impeach the judgment as it is a nullity is not permissible in law (*Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd* [2013] 5 MLJ 1). Likewise the declaratory relief of 'ownership' on

disputed documents and in seeking to set aside the judgment is original relief and is not permissible in law. The intervener has to prove by way of separate proceedings if at all in order to impeach the judgment of the learned judge. This court should not allow the intervener's claim when there is no evidence and the judgment is validly made. The judgment is regularly obtained based on the evidence before the court and it has been perfected. It is settled law that the court cannot set aside a final judgment or order lawfully obtained. The trite legal position is that an earlier judgment can only be impeached when it is prohibited. The Federal Court in the case of *Serac Asia Sdn Bhd*, held that an earlier judgment could only be impeached when it is prohibited by statute resulting in that order being illegal or made outside the jurisdiction of the court. It is only in this respect that the court's inherent jurisdiction may be exercised to strike out the judgment, ex debito justitiae and without the need to file a fresh suit. In this case, in our judgment, it is clear that the decision of the learned judge is a valid one therefore if the intervener wishes to claim the 16 units, they should file a fresh claim against the third defendant as their borrower and their 'assignor'. For the reasons earlier given, the result is therefore that the intervener has not made out their case against the plaintiff as regards their claim of ownership of the 16 units purchased by the third defendant. With respect to learned counsel, his argument, as it is clear to us, is lacking in merit and completely fallacious. The learned judge had paid attention to all matters over the five years of the trial. In the upshot, the intervener's claim is dismissed with costs to be paid to the plaintiff.

A B C D E F

## CONCLUSION

**[194]** There is an abundance of authority on and the law is well settled with regard to appellate intervention in an appeal before the appellate court. While we do not intend to dwell on it in great detail, it will suffice if we refer to the duty of this court relating to appeals after full trial as explained by the Federal Court in the case of *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 which can be well summarissed as follows:

G H I

(a) the Court of Appeal will only interfere if the decision of the High Court is wrong;

(b) the Court of Appeal should not take the responsibility of reversing conclusions arrived at, on the result of their own comparisons and criticism of witnesses and of their own view of the probabilities of the case;

(c) the Court of Appeal must take into account the course of the trial and the whole substance of the judgment;

(d) the Court of Appeal in order to reverse must not merely entertain doubts whether the decision is right but must be convinced that it is wrong;

(e) where there is a conflict of evidence (if any and if raised) the Court of Appeal will have special regard to the fact that the High Court judge saw and heard the witnesses; and

(f) the trial judge must explain why he reached his decision although he need not identify and explain every factor that had weighed him in his appraisal of the evidence and indentify the issue the resolution of which had been vital to his conclusion and explain the manner in which he had resolved them.

**[195]** In the case of *Foo Sam Ming v Archi Environ Partnership* [2004] 1 MLJ 449; [2004] 1 CLJ 759, Gopal Sri Ram JCA in delivering the decision of the Court of Appeal had this to say:

> Viewing the appellant's case as a whole, I find nothing to alter the view I expressed at the outset of this judgment. *That this is an appeal on a question of fact*. The function of this court in an appeal such as this is well established. It is to defer to the views of the *trial judge who had the obvious audio-visual advantage* over oral testimony. Indeed, it would be *quite wrong for this court to interfere* in the present case. (Emphasis added.)

**[196]** Further principle can also be found in the decision of this court in *Hamit bin Matusin & Ors v Penguasa Tanah dan Survei & Anor and another appeal* [2006] 3 MLJ 289; [2006] 2 CLJ 251 wherein it was stated at p 289 (MLJ); p 270 (CLJ), para (42) as follows:

> As a matter of principle, *an appellate court is slow to interfere with the findings of fact arrived at by the trial court with whom the law entrusts the primary task of evaluating the evidence. It would only intervene if convinced that there was no judicial appreciation* by the trier of fact of the evidence adduced at the trial, or the audio-visual advantage enjoyed by the trial judge could not be sufficient to explain or justify his conclusion. There is a *heavy onus on the party who seeks to displace such conclusion* — see *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] MLJ 87 (PC). In another Privy Council case of *Yew Phaik Hoon v Quah Ooi Keat & Anor* [1969] 1 MLJ 32 it is also held that the *finding of the trial judge ought not to be disturbed unless supporting evidence is lacking or if some factual misapprehension of evidence is shown.* As we have shown in the preceding paragraphs of this judgment, no such shortcomings are detected in the disputed findings of the court below. There is therefore no justification for us to intervene ... we find no merit in any of the grounds of appeal submitted on behalf of the state or the co- plaintiffs in their in their respective appeals. We have no cause to interfere with the reasoning or conclusion of the learned JC. We therefore affirm his decision and *dismiss both appeals with costs. Deposits are to be paid to account of costs of the winning party.* (Emphasis added.)

**[197]** Having stated the law as we understand it, this court does not see any compelling reason to interfere in the finding of facts made by the learned judge where he had given full and sufficient judicial appreciation to the facts and the

defence. His Lordship had considered the court's appointed R&M's 12 reports which were unrebutted, the conduct of the defendants and the demeanor and credibility of witnesses.

**[198]** We do not find any meritorious issues that would justify our appellate intervention to warrant a reversal of the decision of the High Court. Moreover, there is nothing in the appellant's memorandum of appeal to suggest to or convince this court that the learned judge had erred or misdirected himself in his decision that has demonstrated some misapprehension of evidence. By way of emphasis, we would say that this court is similarly bound and ought to consider all the matters that the learned trial judge had considered. The learned judge had also considered the issue of lack of credibility of the defence witnesses and found them to be wanting in credibility. The learned judge on this point had the benefit of observing their conduct during the proceedings. His Lordship had come to the conclusion that the third, fourth, sixth and seventh defendants were inconsistent and not being truthful in their own evidence under oath and with each other as well as the documents given that the learned trial judge had the obvious audio advantage over their oral testimony with its inherent contradictions. The learned judge cannot be faulted when he found them to be lacking in credibility and consequently did not attach any weight to their evidence. This is evident from the grounds of judgment. In addition, these defendants were found to be evasive in their testimony and the learned judge had to direct them to answer on numerous occasions.

**[199]** The significance of proper evaluation of credibility on the primary facts of the dispute, more so where the oral evidence cannot be severed from the documentary evidence cannot be ignored. In the case of *UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2018] Supp MLJ 363; [2010] 9 CLJ 785, the Federal Court laid stress on the importance of the interplay between oral evidence and material documentary evidence relating to the circumstances of the dispute. It is instructive to reproduce below the relevant excerpts of the above Federal Court's decision:

> [27] In the instant case, as found by the trial judge, that the case of *UEM* and *GIE* was not one that was premised only on documentary evidence. *The positions of the respective parties depended largely on oral evidence as to the circumstances of the dispute* between the parties as well as the *circumstances underlying material documentary evidence*. In respect of documentary evidence, it was not entirely such that it could be understood without the benefit of explanation by material witnesses.
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> [28] It is for this reason that the trial judge's conclusion that Seow, the only witness put forth by GIE, being not a witness of truth, was of great significance. This is because *GIE*'s case was mounted on the strength of Seow's evidence. *Reliance was placed on Seow as to how documents were to be understood.* Several affidavits were filed by Seow in the proceedings which were then relied upon on Seow's evidence in chief for the trial of both the petitions. *Thus, what the trial judge had to say of Seow as a*

*witness is crucial*. This was what the trial judge said:

> *Seow's evidence in court throughout the proceedings should be treated with great caution.* He was *not a straight-forward witness. He has evaded answers in cross-examination when he considered true answers would be damaging to his case*. His demeanour during cross-examination instil doubt on the truthfulness of his statements. His countless effort in *evading* questions put forth by UEM's counsel and the *reluctance in his answer* is in stark contrast to his solid and meticulous answers when questioned by GIE's solicitors. The court finds that the weight attached to his statements would be considerably low taking into account his bad demeanour.
>
> Seow was *evasive in his answers* during cross-examination. He *contradicted* himself numerous times that, his *credibility as a witness has been totally diminished* (see Seow's evidence on 15 March 2004 at pp 27–29 of the notes of proceedings). Other examples of his inconsistences in his evidence are related below.
>
> In giving evidence before this court, Seow disagreed that he was the director of UEG who had primary responsibility for the financial affairs of UEG (see notes of proceedings dated 17 March 2004 at p 30). However, he had previously sworn a statutory declaration on 15 March 1998 (encl 11 at p 197) that he was the director of UEG who was primarily responsible for the financial management of UEG.
>
> In another occasion, Seow testified in court that he instructed Messrs Gideon Tan Razali Zaini to act for UEG in respect of the D3 Petition in his capacity as a director of UEG together with Christina Rani and not under the DAL (see notes of proceedings dated 23 July 2002 at p 18). However, Seow had also affirmed in the proceedings affidavit No 10, encl 56 where he stated under oath that he had appointed Messrs. Gideon Tan Razali Zaini in his capacity as Chief Executive Officer of UEG and relying on the DAL. When this contradiction was pointed out to him, he testified:
>
> > I agree the version I gave in court is true ... I agree I contradicted myself in my affidavit ... when I said that I appointed Gideon Tan in his capacity as Chief Executive Officer and relying on the DAL ...
> >
> > Obviously, Seow was lying and had forgotten what he had affirmed in his affidavit previously.
>
> Another instance of inconsistency, is about the condominiums which Seow unilaterally accepted as a settlement of a debt due to UEG. In his evidence recorded on 24 July 2002 (at p 22) Seow initially stated that:
>
> > I cannot recall why I accepted this payment in kind.
>
> However, minutes later, he explained the reason to accept the payment in kind as follows:
>
> > At the material times, Sungei Way Construction was renowned to be in dire financial straits and had not paid the amount owing to UEG for a long time. I would be failing my duty as Chief Executive Officer not to accept payment in kind.
>
> (See notes of proceedings dated 24 July 2002 at p 25)

Another example of Seow's untruthfulness is when he confirmed that as a matter of fact that at the end of each financial year there was contra process whereby the 'inter-company' accounts would be resolved (see notes of proceedings dated 17 March 2004 at p 66). However, subsequently Seow admitted that he did not know for a fact that there was contra-process at the end of each year (see notes of proceedings dated 17 March 2004 at page 68). This was extremely significant because Seow was seeking to persuade this court that the 'inter-company' account was reconciled annually but the truth of it was that it had not been reconciled since 1995 as there were item in exh P25 which were unreconciled since them.

On these issues of demeanour and inconsistency the court relies on *Sarkar's Law of Evidence* (15th Ed) Vol 1, Wadha and Company Nagpur 1999:

> The demeanour and bearing of a witness should be very closely observed. Unless a witness is a skilled actor, his demeanour frequently furnishes a clue to the weight of his testimony. It is because *the trial judge had the advantage of seeing the witness that it has been repeatedly held that his decision on question of fact should not be lightly disturbed* ... When the question of credibility depends on the demeanour in the box, the manner in which the witness answer and by how he seems to be affected by the question put and so on, *the trial judge has an advantage*.
>
> In the present case, the demeanour of Seow when he gave evidence was to say the least, at its lowest ebb. There were *pauses, cynical smiles, confusion and inconsistencies, all added into one*. The credibility of Seow as the only witness for GIE is *badly and adversely affected on the balance of probabilities*. Seow's evidence is bristled with *inconsistencies and half truth*.

[29] It can be seen from the above that the trial judge's conclusion as to Seow's credibility was based on his observation not only on material attributes of *Seow's demeanour but also on evident contradictions and inconsistencies on the relevant and material matters. The trial judge referred to specific examples of Seow's contradictions and inconsistencies*. These examples were drawn from the different aspect of the case before him and threaded through the various heads of oppression identified by UEM in its case. To that end, the trial judge noted that Seow *had lied* on affidavit as well as during his oral evidence and was untruthful.

[30] In the light of the above, *it is apparent that this is a case where the findings of credibility could not be severed from documentary evidence. The finding by the trial judge that Seow was being untruthful was an integral part of the whole case on the basis of a reasonable and proper judicial appreciation of the evidence*. This is evident from a reading of the trial judge's judgment as a whole as well as his summary and conclusions. The trial judge had come to findings of specific facts, pertaining to the heads of oppression in the UEM's petition in rejecting the version put forth by Seow. (Emphasis added.)

**[200]** The learned judge was satisfied that the defendants are liable to the claim grounded on negligence, fraud, unjust enrichment, conspiracy to injure, breach of duty of care and fiduciary duty. The defence may have argued that the plaintiff does not set out particulars or details of fraud, however para 7 of the statement of claim clearly states the basis upon which fraud was alleged in that

the facts are set out in the pleadings which precede the said paragraph. In other words the basis for and circumstances of fraud are clearly set out in the statement of claim if one were to read the pleadings in totality. Indeed, based on the plaintiff's claim which we have set out in great detail in this judgment and the evidence led, it becomes increasingly clear that the same manifestly reveal fraudulent and other unlawful conducts of the defendants as found by the learned judge. In any event, we do not think that the defendants suffered any prejudice since by their conduct they had clearly entered upon and engaged into this issue during the trial. It cannot be denied that both the plaintiff and the defendants addressed the issue sufficiently during the trial and in the course of their submissions.

**[201]** Mindful of the approach that this court had to adopt in dealing with appeals as described by the English Court of Appeal in the case of *English v Emery Reimbold & Strick Ltd; DJ & C Withers (Farms) Ltd v Ambic Equipment Ltd; Verrechia (trading as Freightmaster Commercials) v Commissioner of Police of the Metropolis* [2002] 3 All ER 385; [2002] EWCA Civ 605 at para [26], we have firstly reviewed the judgment, in the context of the material evidence and submissions at the trial, in order to determine whether, when all of these are considered, it is immediately apparent why the learned judge reached the decision that he did. We are satisfied that the reasons set out in the judgement are plain and that it is a valid basis for his decision. By way of postscript, we must say that it is the duty of the learned judge to produce a judgment that gives a clear explanation for his order. The grounds of judgment indicates that there was a proper, adequate and correct judicial appreciation of the entire evidence in order to ascertain the truth of the matter.

**[202]** In all the circumstances, reason and justice point to the inevitable conclusion that His Lordship's appreciation of the evidence and assessment of the credibility of the witnesses tested against the totality of evidence cannot be faulted. In the end, all of the factors and evidence to which we have alluded are sufficient to support our view that there is a good deal of substance in the arguments put forward by learned counsel for the plaintiff that the findings made by the learned judge were not erroneous. We are therefore left with the feeling that there should be no reasons that the decision of the learned judge in the instant action under consideration in this appeal should be set aside. In the result, these appeals are dismissed and the decision and order of the learned judge are affirmed unanimously. We award costs to the plaintiff.

CROSS-APPEAL

**[203]** The argument which we may now consider as the last remaining point focuses on the plaintiff's cross-appeal. One of the remedies sought by the plaintiff in this case to give redress to the wrongs caused to them as described in

the statement of claim is 'special exemplary damages and punitive damages'. The plaintiff has filed the cross-appeal for exemplary damages which had been claimed but not granted by the learned judge. In considering this cross-appeal, it is necessary to be clear in our minds that the award of exemplary damages has a punitive aim. Such award is not intended to compensate the plaintiff for the wrongs caused to or losses suffered by them but rather to punish the defendants for committing the said wrongs or in causing the said losses to the plaintiff. Accordingly, when the plaintiff is claiming for 'special exemplary damages and punitive damages, they are in fact seeking an award of exemplary damages only. In the seminal case of *Rookes v Barnard & Ors* [1964] AC 1129 the House of Lords established three categories in which exemplary damages may be awarded:

(a) where there has been oppressive, arbitrary or unconstitutional conduct by the servants of the government;

(b) where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff; and

(c) where a statute has expressly authorised it.

**[204]** The plaintiff in this cross-appeal is seeking the exemplary damages in the sum of RM5m. The reasons, inter alia, are these:

(a) the third, fourth, sixth and seventh defendants were and are lawyers who should be placed with a higher degree of responsibility in line with their profession, knowingly conducted themselves illegally and/or unlawfully and negligently re the trust assets with the intention to deprive the poor and illiterate *orang asli* beneficiaries of the trust and the trust assets;

(b) the defendants filed several frivolous applications to remove the R&M on the same grounds;

(c) the defendants filed a counterclaim against the R&M, his fellow directors in the firm he is attached to, his lawyers and the 228 Suit plaintiffs and their lawyers, claiming siphoning off of the trust funds and conspiracy;

(d) the defendants knowingly perpetrated a fraud and illegality by retaining the trust funds, by entering into the management agreement on a self-dealing basis, on unfair terms and earning secret profits for their own benefits;

(e) the lodging of baseless police reports against the R&M and his counsel with intention to intimidate and being extremely proud of this fact and tendering this in court;

(f) the defendants disobeying the orders made in the 228 Suit and 106 Suit and refusing to give up Trust documents which led the R&M to retrieve the same at cost, time and expense from third parties and then the defendants surfacing the trust documents on a piece-meal and on a selective basis during the course of the trial in the court below. The defendants are still concealing trust documents;

(g) the defendants all knew and assisted each other to commit these wrongdoings to the detriment of the trust over which the third, fourth and fifth defendants had complete control;

(h) despite agreeing that the 27 units were bought for the trust and alleging that they had 'delivered' possession, they failed to actually deliver possession with the keys with a proper inspection and hand over, wasted the court's and all parties' time and incurred unnecessary costs by not resolving these matters earlier. Additionally, they continued to maintain their defence on these conceded and admitted issues;

(i) the defendants knowingly gave contradictory, inconsistent, irrelevant and false evidence which did not support their defence but such evidence was given to mislead the court from the real issues of their fraud and breaches;

(j) the defendants knowingly gave scandalous evidence about the R&M, the R&M's representatives and counsel, the 228 Suits plaintiff counsel, the alleged conspiracy between them and the alleged fraud by them, which, firstly did not support their defence at all and secondly, they could not even prove and instead was merely given to mislead the court from the real issues of their fraud and breaches. This wasted the court's and the parties' time;

(k) the defendants decided unilaterally to stop paying the trust rental during these proceedings from May 2013 and unilaterally decided to offer an excuse for this towards the end of the trial in utter disrespect and contempt of the court and its appointed R&M; and

(l) the second defendant did not even turn up in court once and showed his complete disrespect to the court and to the proceedings.

**[205]** Learned counsel for the defendants raised a preliminary objection to the cross-appeal contending that it is wholly unconnected to and independent of the main appeal. The plaintiff ought to have filed a separate notice of appeal on the dismissal of their claim for exemplary damages in accordance with r 5 of the Rules of the Court of Appeal 1994. The Rules of the Court of Appeal 1994 is very clear and there is also a clear authority to show that a separate appeal needs to be filed. The Federal Court in *Kabushiki Kaisha Ngu v Leisure Farm Corp Sdn Bhd & Ors* [2016] 5 MLJ 557 had decided that if a party wished to attack a substantive finding of the court below, that party had to file a proper notice of

appeal and the appeal on a point which did not affect the original appellant should not be by way of a cross-appeal. The cross-appeal is clearly unconnected with the substance of the appeal hence it is fatally flawed. We find no difficulty whatsoever to hold, on the strength of the well-recognised principle, that this cross-appeal on the grounds raised in the preliminary objection ought to be dismissed with costs to the defendants as it is fatally defective. This conclusion must dispose of the cross-appeal. Nevertheless, in case it be wrong, we turn to consider the merits of the cross-appeal.

**[206]** It ought to be emphasised that the function of damages principally is compensatory but on the contrary exemplary damages are in fact punitive damages which are awarded not to compensate the aggrieved party. The purpose of exemplary damages is to deter bad actions on the part of possible future defendant and to make sure the defendant is appropriately punished for any wrong caused to or loss suffered by the plaintiff. In these appeals, the losses suffered had already been sufficiently compensated by of way general damages and other redresses. In fact the 27 units and the additional 30 units have been declared by the High Court to be the assets of the trust and ordered to be returned to the trust. All the monies spent out of the RM7m as well as all the secret profits earned consequent upon the withdrawal of the RM7m from the trust fund have been ordered to be returned to the trust as general damages totalling RM10,430,334. In simple terms, following the High Court's order, the trust had been amply and fully restituted and adequately compensated. the trust is given the ownership the 27 units and the additional 30 units with no loss and instead with its value that has undoubtedly enhanced. Thus any award of RM5m or other sum as exemplary damages would not be justified. Lord Devlin in *Rookes v Barnard*, at pp 1227–1229 said:

> ... the power to award exemplary damages constitutes a weapon that, while it can be used in defence of liberty...can also be used against liberty ... I should not allow the respect which is traditionally paid to an assessment of damages by a jury to prevent me from seeing that the weapon is used with restraint.

His Lordship then emphasised:

> ... the means of the parties, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages. Everything which aggravates or mitigates the defendant's conduct is relevant.

Taking into account the second category in which exemplary damages may be awarded as established in *Rookes v Barnard*, we do not find any evidence where the defendants' conduct had been calculated by them to make a profit for themselves from their wrongdoings which may well exceed the compensation payable to the plaintiff. Conversely, everything has been ordered to be fully restored to the plaintiff resulting in no loss to them. We think that this is an appropriate case where some restraint should be exercised and the means of the defendants ought to be considered in determining whether exemplary damages

should be allowed. In the event, we find the cross-appeal to be wholly lacking in merit, as such we dismiss it with costs to the defendants.

*Order accordingly.*

Reported by Ashok Kumar